1997

Ann Elizabeth Thomas v.Bert Charles Thomas : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

970472-CA

ANN ELIZABETH THOMAS.

Appellant.

vs.

BERT CHARLES THOMAS,

Appellee.

BRIEF OF APPELLANT

Appeal No. 970472-CA

Priority No. 15

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APPEAL FROM AN ORDER IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH,
THE HONORABLE LYNN S. DAVIS PRESIDING

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

ADDENDUM

A. Findings of Fact and Conclusions of Law

B. Ruling of Judge Lynn W. Davis, dated August 19, 1996

C. Custody Evaluation of Jay P. Jensen

D. Custody Evaluation of Elizabeth B. Stewart, Ph.D.

E. Derk Rasmussen Exhibits regarding Bert Thomas Construction Company assets

F. Bert Thomas Construction Company "Tool List 1/1/95"

G. Utah Bar Journal, Volume XI, No. 3, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce,* April, 1998, pages 16 - 24, David S. Dolowitz.

TABLE OF AUTHORITIES

Cases

Statutes

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STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal properly lies with the Utah Court of Appeals pursuant to §78-2a-3(2)(h), Utah Code Ann. (1953 as amended).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

a. Issue I: Did the court err in awarding the Respondent custody of the parties' children where the court concluded that "it is clearly in the best interests of the children to be awarded to Ann Thomas", but for the findings regarding moral fitness and the character of a non-cohabitant third party?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous"

standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984).

b. Issue II: Did the Court err in limiting the Petitioner's alimony award to thirty-six (36) months without any supporting findings?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous" standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984). "However, to insure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." Sukin v. Sukin, 842 P.2d at 923 - 24 (quoting Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988)).

c. Issue III: Did the court err in failing to find that the family home was a marital asset in its entirety?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous" standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984). "However, to insure the court acted within its broad discretion, the facts and reasons for the court's decision

must be set forth fully in appropriate findings and conclusions." Sukin v. Sukin, 842 P.2d at 923 - 24 (quoting Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988)).

d. Issue IV: Should the court have included in the martial estate Bert Thomas Construction Company, including cash on hand which was depleted during the pendency of the case in part to pay court ordered support obligations?

STANDARD OF REVIEW: The decision of the Court is subject to "an abuse of discretion or manifest injustice" standard. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989). This standard is referred to as "clearly erroneous" standard. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989), and Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984). "However, to insure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." Sukin v. Sukin, 842 P.2d at 923 - 24 (quoting Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988)).

DETERMINATIVE CONSTITUTIONAL PROVISIONS. STATUTES. ORDINANCES AND RULES.

A. Statutes:

i. §78-2a-3(2)(h), Utah Code Ann. (1953 as amended).

ii. Utah Code Ann, §30—3—10(1) (1953 as amended).

iii. Rule 4-903 of the Code of Judicial Administration

iv. Rule 705 of the Utah Rules of Evidence

B. Case Law:

i. Berger v. Berger, 713 P.2d 695, 697 (Utah 1985);

ii. Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989).

iii. Fletcher v. Fletcher, 615 P.2d 1218, 1222-1223 (Utah 1980).

iv. Fontenot v. Fontenot, 714 Pl.2d 1131, 1132-33 (Utah 1986);

v. Jeffries v. Jeffries, 895 P.2d 835 at 838 (Utah App. 1995).

vi. Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980);

vii. Lynn v. Lynn, 165 N.J. Super. 328 (N.J. App. Div. 1979).

viii. Maughn v. Maughn, 770 P.2d 156, 159 (Utah App. 1989).

ix. Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990).

x. Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988).

xi. Nielsen v. Nielsen, 620 P.2d 511, 514 (Utah 1980)

xii. Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987);

xiii. Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989).

xiv. Roberts v. Roberts, 835 P.2d 193 (Cal. 1992).

xv. Sanderson v. Tryon, 739 P.2d 623 (Utah 1987).

xvi. Shepherd v. Shepherd, 816 P.2d 249 (Utah App. 1994).

xvii. Shioji v. Shioji, 671 P.d 135, 138 (Utah 1983);

xviii. Stuber v. Stuber, 121 Utah 632, 637, 244, P.2d 650, 652 (1952).

xix. Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991).

xx, Tucker v. Tucker, 881 P.2d 948 (Utah App. 1984).

xxi. Tucker v. Tucker, II. 910 P.2d 1209 (Utah 1996).

xxii. Weiss v. Weiss, 226 N.J. Super. (N.J. App. Div. 1988).

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This divorce case was tried before Judge Lynn W. Davis between December 5 - 8, 1995 and February 26, 1995. Judge Davis' decision was rendered by Memorandum on August 19, 1996. The parties were married eight days short of their 15th anniversary. During the pendency of the action, Ann Thomas enjoyed custody of the two children subject to a liberal and nearly equal time sharing visitation agreement. Custody evaluations were performed by Dr. Elizabeth B. Stewart and Dr. Jay P. Jensen. At trial Dr. Jensen testified that his recommendation was for the parties to divide the physical time with the children equally. Dr. Stewart recommended that the Ann Thomas be awarded sole custody. The court found:

> "The reason this case is so troubling is because of Pedro Sauer and his negative

> influence on the family. Absent his entry, and his influence, it is clearly in the best interests of the children to be awarded to Ann Thomas."

Findings of Fact, ¶79.

Ann Thomas and Pedro Sauer developed a romantic relationship either just prior to separation or after separation. The court found that Mr. Sauer was a "convicted criminal", "suave" and "debonair." In determining that Mr. Thomas should be awarded custody of the children, the court considered the best interests of the children as "an important factor, but will also consider the past conduct and moral standards of the parties" Findings of Fact, ¶57.

Mr. Thomas owned a home 35% completed and under construction at the time of the marriage. The court concluded that the value of the home was $150,000.00 at the time of the marriage based upon the opinion of appraiser Jud Harwood. Mr. Harwood's opinion as to the value at marriage was based upon a data base, notes and an interview which were not available in his report or at trial.

Mr. Thomas owns Bert Thomas Construction Company. He is the sole owner of the company. It maintained a savings account throughout the marriage which averaged a balance of approximately $37,000.00. As money was required for the family from time to time funds would be disbursed to Mr. Thomas as income. That account was substantially depleted during the pendency of the case coincident with Mr. Thomas' self reported reduction in

income. The money was used, among other things, for the payment of court ordered support payments.

Ann Thomas was awarded $700.00 per month alimony for a period of thirty-six (36) months to begin with the commencement of the temporary order. The effect of this order was to terminate alimony prior to the entry of the Decree.

This appeal addresses the following issues:

1. The legal standard applied by the court in determining custody and the weight to be given moral conduct.

2. Whether the court articulated or had any basis to limit the duration of alimony.

3. Whether the court should have considered the family home as a marital asset and commingled any premarital portion thereof.

4. Whether the court should have considered the Bert Thomas Construction Company and its savings account as a dissipated marital asset.

B. COURSE OF THE PROCEEDINGS.

Following the conclusion of trial in February, 1996 oral argument was heard on April 1, 1996. The court rendered its decision on August 19, 1996. The ruling did not deal with all of the issues presented at trial. The ruling did not specify Mrs. Thomas' visitation rights or the amount and duration of alimony. These matters were heard subsequently by motion and two additional rulings were made which have been incorporated in the final Findings of Fact and Conclusions of Law, and Decree of

Divorce which were entered on July 9, 1997. Ann Thomas filed her Notice of Appeal on August 5, 1997.

C. DISPOSITION OF TRIAL.

The trial court entered its Findings of Fact and Conclusions of Law, and Decree of Divorce on July 9, 1997.

STATEMENT OF FACTS

1. The parties were married July 17, 1983.

2. The parties have had two children born of the marriage as follows: Joseph, born July 12, 1986 and Katy, born July 8, 1989.

3. The parties separated on March 21, 1983.

4. Mrs. Thomas is a schoolteacher, aged forty (40) years old, with a B.S. degree from the University of Utah. She teaches in the Alpine School District in the same school the children attend. (Findings of Fact, ¶¶5 - 7.)

5. Mr. Thomas is a self—employed building contractor, a high school graduate, who lives in the Sundance, Utah County area, and concentrates his business in that community. (Findings of Fact, ¶8 and 9.)

6. The trial court considered the "best interests of the child" as an important factor but also considered the past conduct and moral standards of the parties and which parent will act in the best interests, and the other relevant factors such as keeping the siblings together and each child's bond with the parent. (Findings of Fact, ¶57.)

7. The court adopted Dr. Stewart's finding of a strong sibling bond and found that it was in the best interests of the children not to be separated. (Findings of Fact, ¶58.)

8. Ann Thomas was the primary caretaker for the children prior to the parties' separation and has performed well as the mother of the children before separation and since. (Findings of Fact, ¶62—63.)

9. Mr. Thomas acknowledged that Ann Thomas is a competent, caring mother who has indeed been the primary care giver for the children throughout their lives. (Findings of Fact, ¶64.)

10. As the primary care giver, Mrs. Thomas has seen to the day to day needs of the children, typically been the parent who has been home when they return home, assisted the children with their school work, made sure the children received the appropriate medical and dental care, typically transported the children when such was necessary, entertained the children, disciplined the children and so forth. Mr. Thomas was also involved in these activities. (Findings of Fact, ¶65.)

11. The children interact with Mrs. Thomas as their primary care provider and have established confidence in her as the primary care provider. (Findings of Fact, ¶66.)

12. The court interviewed Joseph and Katie in the course of the proceedings. (Finding of Fact, ¶52.)

13. The children's social needs have principally been met through their school association. (Findings of Fact, ¶69.)

14. It is unclear when Ann Thomas and Mr. Pedro Sauer entered into a sexually intimate relationship, whether prior to separation or since that time. (Findings of Fact, ¶73(e).)

15. The relationship between Mrs. Thomas and Mr. Sauer has continued for several years and it is their intention to marry when they are legally able. Mr. Sauer was still married at the time of trial. (Findings of Fact, ¶74.)

16. Custody evaluations were performed by Dr. Jay P. Jensen and Dr. Elizabeth B. Stewart. Both experts provided written evaluations.

17. Dr. Jensen favored a joint physical custody award with the children residing with one parent for one week and the other parent the next with no intervening visitation for either party. (Trial Transcript, Volume III, page 113, Lines 4 - 25.)

18. Dr. Stewart recommended that Ann Thomas be awarded sole custody. (Trial Transcript, Volume I, page 106, lines 2 - 13.)

19. Dr. Jensen relied upon information related to him from Mr. Thomas who, reportedly, gathered information from Pedro Sauer's wife and Mrs. Thomas. (Trial Transcript, Volume I, page 45, lines 13 — 25, and page 46, lines 1 — 13.)

20. Dr. Jensen did not contact collateral sources provided by the parties because Mrs. Thomas had provided more collateral sources than Mr. Thomas and he wanted to keep the evaluation as "bilateral as possible." (Trial Transcript, Volume I, page 47, lines 17 — 25, and page 48, lines 1 — 13.)

21. Dr. Jensen reported "through the evaluation process it became clear that information regarding Ann's boyfriend was a central concern to the best interests of the children." (Trial Transcript, Volume I, page 48, lines 9- 12)

22. Dr. Jensen found "there are no apparent deficits of natural ability of either parent to provide for the children's physical, emotional and spiritual needs." (Trial Transcript, Volume I, page 53, lines 10 - 15).

23. Mr. Thomas' report regarding Pedro Sauer affected Dr. Jensen's perception of Mrs. Thomas and her ability to provide for the children. (Trial Transcript, Volume I, page 62, lines 8 - 19).

24. Dr. Jensen was not able to observe any negative impact presently on the children by virtue of Mr. Sauer. (Trial Transcript, Volume I, page 63, lines 2 - 17.)

25. Dr. Jensen testified that he did not believe Pedro Sauer played a central role in the formation of his opinion about the children's best interests. Rather, Mr. Sauer represented a potential and present "source of instability" to the children. (Trial Transcript, Volume I, Page 77, lines 18 - 25, page 78, lines 1 -19.)

26. Dr. Jensen determined that it was not necessary to speak to Mr. Sauer and did not, in fact, speak with Mr. Sauer. (Trial Transcript, Volume I, page 80, lines 15 - 25 and page 8, lines 1 - 7.)

27. Dr. Stewart interviewed the parties and Pedro Sauer. (Trial Transcript, page 92, lines 15 - 25, and page 93, lines 1-6.)

28. Dr. Stewart considered two principal questions: (1) whether or not Mrs. Thomas had an appreciation for the children's relationship with Mr. Thomas; and (2) Mr. Sauer's impact on Ann's parenting ability and whether or not that affects her ability to have custody. (Trial Transcript, Volume I, page 94, lines 4 - 11.)

29. Dr. Stewart concluded that the Thomas marriage was in trouble for some time before Ann Thomas met Pedro Sauer and did not believe that Mr. Sauer was responsible for the divorce. (Trial Transcript, Volume I, page 95, lines 20 - 25; page 96, lines 1 - 25; and page 97, lines 1 - 20.)

30. Based upon Dr. Stewart's evaluation of Mr. Sauer, Dr. Stewart concluded that Mr. Sauer was aware of Mr. Thomas' position, was sympathetic to that position and was not aggravating the relationship between Mr. and Mrs. Thomas and was sensitive to the children's individual differences and how they related to their father, as well as being generally supportive of Mrs. Thomas. (Trial Transcript, Volume I, page 100, lines 11 - 25, and page 101, lines 1 - 12.)

31. Dr. Stewart did not observe any negative impact on the children by virtue of the relationship between Ann Thomas and Pedro Sauer. (Trial Transcript, page 101, lines 13—17.)

32. Dr. Stewart found agreement with Dr. Jensen's report as to Mrs. Thomas being an exceptional caretaker and that Mrs. Thomas was a very good father. (Trial Transcript, Volume I, page 104, lines 1 - 9.)

33. Dr. Stewart concluded that she saw no evidence that the relationship between Mrs. Thomas and Pedro Sauer had a negative impact on her parenting skills. (Trial Transcript, Volume I, page 105, lines 8 - 25.)
105, lines 8 — 25.)

34. Dr. Stewart did not recommend joint legal or physical custody because the parties were unable to cooperatively work with one another. Joint physical custody would be too stressful on the children, and the children regarded their mother's residence as "home". (Trial Transcript, Volume I, page 106, lines 14 - 25; page 107, lines 1 — 5, page 108, lines 1 — 23.)

35. Dr. Stewart did not find that the children were aware of any confrontation between Pedro Sauer and Mrs. Sauer at Ann Thomas' home. (Trial Transcript, Volume II, page 17, lines 5 - 25, and page 18, lines 1 - 3.

36. Dr. Stewart agreed with Dr. Jensen's finding that Mr. Thomas was susceptible to "emotional overspill" because of his feelings about the relationship between Mrs. Thomas and Mr. Sauer. (Trial Transcript, Volume II, page 20, lines 1 - 9.)

37. Dr. Stewart could find no objective evidence that the Ann Thomas / Pedro Sauer relationship negatively impacted the

children. On the contrary Dr. Stewart found that Mr. Sauer's presence had a soothing effect and the children expressed a good relationship with Mr. Sauer. (Trial Transcript, Volume II, page 24, lines 13 - 25; page 25, lines 1 — 25, page 26, lines 1 — 17.)

38. The court conducted its own examination of Dr. Stewart and inquired, specifically, about "Brazilian culture", "machismo", and "how an individual with a Brazilian culture might approach a relationship such as this, at least at the initial stages." (Trial Transcript, Volume II, page 43, lines 10 - 14.)

38. The Court concluded that Mr. Sauer was, at the time of trial: (1) a married man; (2) not a citizen of the United States: (3) Brazilian in the United States on a work permit; (4) a martial arts instructor; (5) fathered a child with his wife while attempting to reconcile with her; (6) had been charged with domestic violence; (7) was charged with a possession of a firearm while at Lake Powell and "may have also violated his work permit status in the United States;" (8) participated in other adulterous affairs; (9) was presently going through his own divorce; (10) made Mrs. Sauer's United States residency status unknown; (11) had a dramatic affect on the breakup of the Thomas family; and (12) Mrs. Thomas viewed him as a very positive male role model. (Findings of Fact, ¶72 and 73.)

39. Pedro Sauer owns and operates his own martial arts studio teaching Brazilian Jiu Jitsu and is an instructor for the United States Navy SEAL Team. (Trial Transcript, Volume IV, page

8, lines 10 — 25; page 9, lines 1 - 6.)

40. Mr. Sauer entered a "plea in abeyance" as to a charge of possessing an unregistered gun or some similar charge. There was no conviction. (Trial Transcript, Volume IV, page 16, lines 9 — 25; page 17, lines 1 — 25; page 18, lines 1 - 25; page 19, lines 1 - 25; and, page 20, lines 1 - 5.)

41. Mr. Thomas called Martina Sauer as a witness who stated emphatically that Mr. Sauer has not been violent with her. (Trial Transcript, Volume IV, page 129, lines 2 -10.)

42. The court found that Mr. Sauer was irresponsible, had impacted the Thomas family because he did not contribute financially to it and had a confrontation between himself and his spouse at the Thomas home. (Findings of Fact, ¶78.)

43. Nevertheless, the court concluded, significantly:

> **"Absent his [Pedro Sauer's] entry and his influence, it is clearly in the best interests of the children to be awarded to Ann Thomas. With Pedro in the picture, which he is and intends to be, it is not in the best interests of the children to be in the home and subjected to the negative influence and example of Pedro."** (Emphasis added) Findings of Fact, ¶79.

44. The court found that Mr. Thomas' income was $69,567 per year which was the average income from 1988 to 1992, prior to separation. (Finding of Fact, ¶106.)

45. Mr. Thomas' income inexplicably, according to his own testimony, declined sharply since separation. (Finding of Fact, ¶104.)

46. Mrs. Thomas earned $25,824 per month as a school teacher and she was ordered to pay $334.61 per month based upon a sole custody worksheet (in spite of the fact that the ultimate custody/visitation award constitutes a joint physical custody relationship). (Finding of Fact, ¶113.)

47. The court found that Ann Thomas should be awarded $700.00 per month as alimony and properly considered all of the elements to arrive at that amount. (Finding of Fact, ¶124 — 127.)

48. However, the court limited the alimony award to thirty-six (36) months and provided for a credit for the amounts paid pursuant to the temporary order. (Finding of Fact, ¶127.) No findings were made which would indicate the basis for the thirty six (36) month limitation on alimony.

49. At the time of the divorce, the parties' family home was worth $355,000.00. (Finding of Fact, ¶44.)

50. At the time of the parties' marriage, Mr. Thomas had owned the building lot and had begun construction on the family home and it was 35% completed. (Trial Transcript, Volume III, page 44, lines 25; page 45, lines 1 — 25.)

51. Mr. Harwood testified that the value of the home at the time of the marriage was $150,000.00. (Trial Transcript, Volume III, page 20, lines 22.)

52 However, Mr. Harwood relied upon a "data bank" and comparable sales, or a "market approach" that were not reflected in his report and not available at the time of trial on cross

examination. (Trial Transcript, Volume III, page 44, lines 1 - 24; page 47, lines 4 — 7; and page 49, lines 11 - 14; page 51, lines 3 — 4, and Exhibit 31.)

53. The parties cohabited prior to their marriage and from the period of cohabitation forward Mrs. Thomas contributed to the construction of the home through her own manual labor, the acquisition of building materials, and building of retaining walls and generally assisting the Defendant who acted as the general contractor for the building of the home. The court characterized these efforts as "modest" on the part of Mrs. Thomas. (Finding of Fact, ¶36.)

54. The Respondent acknowledges that Mrs. Thomas assisted in building the retaining walls, getting the materials for the home, and with the interior decoration of the home. (Trial Transcript, dated February 26, 1996, page 127, lines 8 - 23.)

55. The court values Mr. Thomas' "pre—marital" interest in the home at $150,000.00, apparently adopting Mr. Harwood's opinion based upon the data base which was not available at trial. (Finding of Fact, ¶40 and 50.)

56. Shortly after the marriage of the parties they borrowed $27,000.00 which has been paid during the marriage and had a principal balance of $17,500.00. (Trial Transcript, Volume IV, page 83, lines 24 - 25; page 84, lines 1 - 3.) The loan was from Mrs. Thomas' father.

57. The title to the home was conveyed to the parties as joint tenants. (Finding of Fact, ¶34.)

58. Mr. Thomas owns Bert Thomas Construction, Inc.

59. Mr. Thomas maintained a savings account in Bert Thomas Construction as well as an operating checking account. His money was required to pay company expenses or provide income for Mr. Thomas. Funds were transferred from the savings account to the checking account. (Trial Transcript, Volume II, pages 97 - 102)

60. The average account balance for the combined savings and checking account prior to separation was $39,000.00 The average balance in the account after separation was reduced to $6,327.62. (See Plaintiff's Exhibits 7, 8, 9, 10 and 11, and Trial Transcript, Volume II, pages 99 — 104).

61. Mr. Thomas has acknowledged utilizing the Bert Thomas Construction Company funds in order to pay his court ordered support obligation under the temporary order. (Trial Transcript, dated February 26, 1996, page 122, lines 8 - 19.)

62. Mr. Thomas testified as to the value of the assets of Bert Thomas Construction Company. The court concluded that there was insufficient evidence to sustain a finding as to the value of the construction company.

63. In addition to the testimony of Derk Rasmussen, CPA, regarding the historical cash assets of the Construction Company, Mr. Thomas testified by way of his Exhibit 63 that the value of the company's "tools" amounted to $7,634.00. (Exhibit 63, amended by the Respondent at trial to include Items 113 and 114).

SUMMARY OF ARGUMENT

I. WHERE THE COURT RULED THAT "IT IS CLEARLY IN THE BEST INTEREST OF THE CHILDREN TO BE AWARDED TO ANN THOMAS" IT IS CLEARLY ERRONEOUS TO IGNORE THAT FINDING AND AWARD THE CHILDREN TO THE RESPONDENT BASED SOLELY ON FINDINGS OR MORAL FITNESS AND THE CHARACTER OF A NON-COHABITING THIRD PARTY.

The court correctly concluded that the children's best interests would be served by an award of custody to Mrs. Thomas. However, the court ignored that finding and awarded Mr. Thomas custody. The sole or controlling reasons for the award of custody to Mr. Thomas were: (1) Mrs. Thomas' past moral conduct; and (2) the character of Pedro Sauer, a romantic acquaintance of the Petitioner. In so doing the court placed too much weight upon those factors. This is not a "close call" case. Rather, it is a case where the best interests of the children were otherwise "clear".

The court's conclusions regarding Pedro Sauer appear to be based upon some other experience with Brazilian men and Brazilian culture. The court did not make any connection between Mrs. Thomas' moral conduct or Mr. Sauer's character and the Petitioner's parenting ability or the best interests of the children. In its attempt to make that connection, the court has simply created a transparent rationale for punishing past moral transgressions.

II. ALIMONY SHOULD CONTINUE FOR A PERIOD NOT TO EXCEED THE DURATION OF THE MARRIAGE WHERE NO FACTS APPEAR WHICH WOULD JUSTIFY TERMINATION AFTER THREE YEARS, INCLUDING PAYMENTS UNDER THE TEMPORARY ORDER.

The Petitioner does not object to the amount of alimony only its duration. The court limited alimony to thirty-six (36) months and provided the Respondent credit for payments made during the pendency of the case. However, there are no findings to indicate that circumstances will change at the end of thirty-six months. In fact, alimony terminated prior to the entry of the decree. The court should extend alimony for a period of time not to exceed the length of the marriage.

III. THE MARITAL HOME IS A COMMINGLED ASSET AND SHOULD HAVE BEEN EQUITABLY DISTRIBUTED TO THE PARTIES. FURTHERMORE, THERE IS NOT RELIABLE FACTUAL BASIS FOR THE COURT'S FINDING OF A PREMARITAL FAIR MARKET VALUE.

The martial home was substantially constructed during the marriage. The lot was owned by the Respondent prior to the marriage and the home construction begun prior to that time. However, Mrs. Thomas has enhanced, maintained and protected the home. The marital home is a peculiar asset when compared with other, traditionally "separate" assets. It is particularly susceptible to "commingling" and was commingled in this case. This court may clarify previous decisions which may be contradictory or confusing regarding the commingling of premarital property.

IV. THE COURT SHOULD HAVE VALUED AND DISTRIBUTED BERT THOMAS CONSTRUCTION COMPANY INCLUDING THE HISTORICAL BALANCE IN THE LIQUID ACCOUNTS WHICH WERE DISSIPATED BY THE RESPONDENT.

The court failed to make findings or to equitably distribute the value of Bert Thomas Construction Company. Not only is the company possessed of "hard" assets including

equipment and cash, the cash on hand was dissipated during the pendency of the divorce during an "inexplicable" reduction in Mr. Thomas' income. The company was susceptible to valuation and is marital property. The use of the liquid assets by Mr. Thomas constitutes dissipation.

DETAIL OF ARGUMENT

POINT I.

WHERE THE COURT RULED THAT "IT IS CLEARLY IN THE BEST INTEREST OF THE CHILDREN TO BE AWARDED TO ANN THOMAS" IT IS CLEARLY ERRONEOUS TO IGNORE THAT FINDING AND AWARD THE CHILDREN TO THE RESPONDENT BASED SOLELY ON FINDINGS OR MORAL FITNESS AND THE CHARACTER OF A NON-COHABITANT THIRD PARTY.

The Appellant challenges the custody ruling of the trial court for the following reasons:

1. The court applied an incorrect legal standard for the determination of custody. The best interests of the children should have been given paramount and controlling consideration. Instead the court placed too much weight upon "past conduct and moral standards of the parties".

2. The court failed to adequately articulate how Pedro Sauer's character deficiencies negatively affected the best interests of the children. The court does not attempt to show that Mrs. Thomas' parenting ability is diminished because of the relationship with Mr. Sauer.

3. Key factual findings regarding Mr. Sauer's past behavior are not supported by the evidence.

Trial courts have broad discretion in custody matters: "However, while the trial court has broad discretion, it must be guided at all times by the best interests of the child." Tucker v. Tucker, II. 910 P.2d 1209 (Utah 1996) referring to Utah Code Ann. §30—3—10(1).

One of the factors to be considered is the moral conduct of the parties. However,

> "Utah courts have previously noted that a custodial parent's censurable extra-marital sexual activities do not in and of themselves make him or her an unfit and improper person to have custody. Tucker v. Tucker I, 881 P.2d 948 (Utah Ct. App. 1994). See Fontenot v. Fontenot, 714 Pl.2d 1131, 1132-33 (Utah 1986); Shioji v. Shioji, 671 P.d 135, 138 (Utah 1983); (Durham, J., concurring and dissenting); Nielsen v. Nielsen, 620 P.2d 511, 514 (Utah 1980)(Hall, C.J., dissenting); Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980); Stuber v. Stuber, 121 Utah 632, 637, 244, P.2d 650, 652 (1952).

In order to avoid the tendency to deny custody to an unfaithful spouse/parent as a punitive matter, Utah courts have required trial judges to show: (1) that the parent's activities run contrary to the child's best interests; and (2) that the inappropriate moral conduct results in an inability to function adequately as the custodial parent and meet the child's needs. Tucker v. Tucker I, Supra, and Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989).

It is inappropriate for the trial court to base its decision solely upon a party's sexual conduct. Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990). In that case, the

matter was not reversed because the court had considered other factors relevant to the child's best interest. In this case the court has considered other, relevant factors. However, in this case, the court determined that based upon the other factors, it would clearly be in the best interests of the children for Mrs. Thomas to be awarded their custody. The decision not to do so is based entirely upon either Mrs. Thomas' past moral conduct or Mr. Sauer's character. If the decision was based upon Mrs. Thomas' moral conduct, absent some connection to her parenting ability, the award is an abuse of discretion. Roberts v. Roberts, 835 P.2d 193 (Cal. 1992), the concept of fault [punishment] is unrelated to best interests; Sanderson v. Tryon, 739 P.2d 623 (Utah 1987). The court should demonstrate how the past moral conduct bears upon the parties' parenting abilities or affects the children's best interests.

The case before the court now is distinguishable from the case of Tucker v. Tucker, supra. In that case the Supreme Court found that it was not a case of parental fitness. Rather, it was a case of basically equal parenting ability between the parents where the scales were tipped slightly based upon one parent's moral fitness.

In this case, the court has determined that the best interests of the children would "clearly" be served if Ann Thomas were awarded custody, but for the influence of Pedro Sauer. The court found Pedro Sauer's influence to be "troubling" for three reasons: (1) because the affair broke up the Thomas family; (2) because Ann Thomas considered Pedro Sauer to be a positive role

model but was in fact "duped by his suave, debonair and romantic influences;" (3) that it was not in the best interests of the children to be in the home and subjected to his negative influence and example.

In so doing, the court expressly and candidly stated that it would ". . . consider the best interests of the child as an important factor, but would also consider the past conduct and moral standards of the parties. . ." (Finding of Fact, ¶57.)

It is apparently from the court's detailed Findings that this was not a "close call" case except for the question of infidelity and the "entry" of Pedro in the Thomas family.

In spite of the fact that Dr. Stewart failed to detect any negative impact of Mr. Sauer on Mrs. Thomas' parenting ability for the best interests of the children, the court has based its custody decision on such a finding. It should be remembered that Dr. Jensen did not interview Pedro Sauer and could not make any findings about his character and affirmatively stated that Mr. Sauer's involvement did not play a central role in determining the children's best interest.

The court, nevertheless, essentially concluded as follows: (1) Pedro Sauer is an unsavory character; (2) the court was "profoundly concerned" over Mrs. Thomas' favorable impression of Mr. Sauer; and (3) the relationship between Mrs. Thomas and Pedro Sauer had a dramatic affect on the breakup of the Thomas family. As a result, custody should be awarded to Mr. Thomas. As a result the court concluded that Mr. Thomas should be awarded custody in spite of the fact that the other custody factors

clearly indicated that the children's best interests would be served if Mrs. Thomas was awarded custody.

This rationale is flawed and an abuse of discretion because: (1) Mr. Sauer's character has not been shown to be relevant to the children's best interests or Mrs. Thomas' parenting ability; (2) some of the findings are not supported by the fact (those that related to domestic violence and being a convicted criminal); and, (3) the discussion regarding the break up of the Thomas family is a roundabout way of punishing Mrs. Thomas for marital infidelity.

Aside from the hearsay evidence of Mr. Thomas, upon which Dr. Jensen relied, the only evidence regarding Pedro Sauer's criminal behavior is his own testimony where he testified that he entered a "plea in abeyance" in regards to the gun charge.

Pedro Sauer's wife was called to testify by Mr. Thomas. Her testimony was that there has been no domestic violence in the Sauer marriage. The only other evidence to support a finding of "domestic violence" would be the charge of Mrs. Sauer, previous, that such violence had occurred. The charge was never proven, no ruling was ever made upon any criminal or civil case of domestic or cohabitant abuse regarding Mr. Sauer.

Beyond those findings, the trial court referred to factors regarding Mr. Sauer's citizenship, his own pending divorce and the fact that he had fathered a child with his wife while separated from her as a basis for denying Ann Thomas custody of her children (and disrupting the status quo custody order). The

court also found that Mr. Sauer was "suave", "debonair", and had "duped" Mrs. Thomas with his "romantic influence".[1]

All in all the court concluded that it could not conceive how Pedro would be a positive role model for "little Joseph". Such findings about Mr. Sauer's personality are difficult to quantify or define. More important, however, is the difficulty in relating those findings to Ann Thomas' parenting ability or the best interests of the children. If this standard were applied to other cases, then it would be difficult for any parent to be awarded custody where it was shown that they were involved in a romantic relationship at the time of the breakdown of their marriage. There is no evidence whatsoever that Mr. Sauer was anything worse than a poor "role model". In fact, as the court found:

> "The evaluators can make no `objective' link between the `affair' and its impact on the children. The fact of the matter is that they are young and may not appreciate the consequences of a fairly discreet sexual affair. . ." (Findings of Fact, ¶78)

Only when extraordinary circumstances exist should the court consider the impact of third parties such as step parents. Rule 4-903 of the Code of Judicial Administration, **the Uniform Custody Evaluations**, sets forth the criteria that evaluators must consider and respond to each of the factors set forth therein.

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[1] The court demonstrated it's own personal concern regarding "Brazilian culture" and "machismo" in its own examination of Dr. Stewart. Those issues had not been raised anywhere else in the proceedings or at trial. (Trial Transcript, Volume II, page 43; lines 10 - 14.)

Section (3)(E)(vii) provides: "The evaluators must consider and respond to `kinship', including, in extraordinary circumstances, step-parent status." There is nothing in this case to suggest that extraordinary circumstances exist in regards to the relationship between Mr. Sauer and the Thomas children or Ann Thomas for that matter. It is submitted that such extraordinary circumstances would include, obviously, any form of abuse between the third party and the subject children, or behavior that results in some measurable and negative way on the best interests of the children. The court has acknowledged in paragraph 78 of its Findings that no such circumstances exist.

Dr. Stewart specifically found that there was an absence of any negative impact on the
Thomas children by virtue of the relationship between Mrs. Thomas and Mr. Sauer. in fact, Mr. Sauer's presence was "soothing" for the Thomas children.

The initial inquiry should be as to the relevance of the findings regarding Mr. Sauer's citizenship, occupation, criminal record (if one exists) or other character attributes. Mr. Sauer is not even a cohabitant in this controversy. Nobody who interviewed the children, including the Judge, was able to identify any negative impact of Mr. Sauer on the children.

The court has attempted to justify the custody award by finding that Mr. Sauer has not contributed financially to the Thomas family, that there was a confrontation at the Thomas house (albeit brief), which was "not positive for the children", that Mr. Sauer is a convicted criminal and there has been a spouse

abuse charge, and that Mr. Sauer had a dramatic affect on the breakup of the Thomas family. None of these findings has anything to do, except in the most collateral and vague sense, with the best interests of the children or Mrs. Thomas' parenting ability. Taken together they do not form the basis of overcoming what the court also found to be "clearly in the best interests of the children" which would be an award of custody to Ann Thomas.

Whether Pedro Sauer is a "suave, debonair", convicted criminal and spouse abuser, and whether Mrs. Thomas does not believe any of that, does not form a sufficient factual basis for the court's custody award. Those allegations, even if taken at face value, do not overcome the court's ultimate conclusion that Mrs. Thomas should be awarded custody but for Mr. Sauer's entry and influence in the equation.

POINT II.

ALIMONY SHOULD CONTINUE FOR A PERIOD NOT TO EXCEED THE DURATION OF THE MARRIAGE WHERE NO FACTS APPEAR WHICH WOULD JUSTIFY TERMINATION AFTER THREE YEARS, INCLUDING PAYMENTS UNDER THE TEMPORARY ORDER.

The court addressed the issue of alimony in its findings no. 115 through 127. In so doing the court properly considered the needs of Mrs. Thomas, her ability to meet her own needs and the ability of Mr. Thomas to assist her. However, the court inexplicably limited the duration of alimony to three years. Moreover, the court awarded the Defendant "credit" for amounts paid pursuant to the temporary order of the court. (Finding of Fact ¶127.) The temporary order of the court was entered on the

11 day of January, 1992. Therefore, alimony terminated before the Decree was even entered.

Utah courts have found that in the absence of articulated findings showing some anticipated change in circumstances, or grounds for "rehabilitative" alimony, the limitation of alimony to an arbitrary period of time is an abuse of discretion. Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991) (an otherwise appropriate award of $800.00 per month alimony, but limited to one year was made permanent where there were no supporting findings or rationale for the limitation on duration.) In this case there is nothing to suggest that circumstances will change in any financial sense. There were certainly no findings to explain why the court limited alimony to three years or why the court granted "credit" for the alimony paid during the pendency of the case. Normally, decisions regarding the divorce are made at the time of the decree or trial. The exception to that general rule should be based upon clearly stated grounds such as the obstructive activity of a party, the hiding of assets, or the dissipation of assets. Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987); Berger v. Berger, 713 P.2d 695, 697 (Utah 1985); and Fletcher v. Fletcher, 615 P.2d 1218, 1222-1223 (Utah 1980).

POINT III.

THE MARITAL HOME IS A COMMINGLED ASSET AND SHOULD HAVE BEEN EQUITABLY DISTRIBUTED TO THE PARTIES. FURTHERMORE, THERE IS NOT RELIABLE FACTUAL BASIS FOR THE COURT'S FINDING OF A PREMARITAL FAIR MARKET VALUE.

The Appellant does not contest the court's findings regarding the fair market value of the home at the time of the

divorce. Mrs. Thomas' objections are two fold: (1) the failure of the court to consider the home as a marital asset and "commingle" any premarital portion of the Respondent; and (2) the lack of evidence to support the court's finding of a premarital value in the home of $150,000.00.

Mr. Thomas owned the building lot upon which the family home was constructed for several years prior to the marriage. During this period of time the parties' cohabited. Likewise, the parties worked together on the construction of the home, before and after marriage. At the time of the marriage the home was approximately 35% constructed.

Obviously, 65% of the home was constructed after the marriage. In fact, the testimony of Mr. Thomas was that the home was essentially a work in progress and was still being modified and constructed at the time of the trial.

The home was pledged for a loan which was paid during the marriage and had a balance due at the time of the trial. The home had been transferred from Mr. Thomas' name into the joint names of the parties. Mrs. Thomas had separate assets at the time of the divorce. Her separate assets consisted of stock which had been gifted to her (with similar gifts going to her siblings) of stock from her father and grandfather. These funds had been maintained entirely separately, in Mrs. Thomas' name throughout the marriage.

The rule regarding separate property, and "commingled" property is set forth in Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). The rule is simple: Separate property acquired by a

spouse prior to the marriage, by gift or inheritance during the marriage, should be awarded to that party, unless:

> "(1) the other spouse has by his or her effort or expense contributed to the enhancement, maintenance, or protection of that property thereby acquiring any equitably interest in it, or (2) the property has been consumed or its identify lost through the commingling or exchanges or where the acquiring spouse has made a gift of an interest there and to the other spouse. Mortensen, supra, at 306 (citations omitted).

Cases dealing with separate property which follow Mortensen had obscured that rule. See, Utah Bar Journal, Volume XI, No. 3, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce,* April, 1998, pages 16 - 24, David S. Dolowitz, attached as Exhibit G in the Addendum.

Some properties are more likely to be commingled due to "enhancement, maintenance and protection" than others. Other factors would indicate that otherwise separate property has been transformed to marital property such as: the length of time that the property exists during the marriage, the nature of the property, real estate occupied by the parties, separate bank accounts, separate securities, whether the asset requires the ongoing use of marital funds to pay property taxes, mortgage expenses, maintenance, remodeling, repairs or the like:

> "The longer gifted, inherited or premarital property is maintained during a marriage the more difficult it is to show it is a separate property. . . As discussed above, the payment of property taxes, refinancing, maintenance, remodeling, repair of a home or a rental property presents the probability of commingling." *The Conundrum* . . ." Supra, at page 23.

The rationale of the court in awarding Mr. Thomas $150,000.00 as premarital separate property is as follows: (1) the property was not commingled; and (2) even if it were because it is clear that Mrs. Thomas should get her separate property it is only fair for Mr. Thomas to be awarded his.

If Mortensen v. Mortensen, supra, is to have any meaning, then a case such as this should result in a conclusion that the family home is a marital asset. It was primarily constructed during the marriage. In addition to the payment of a mortgage, taxes, remodeling, repair and maintenance, Mrs. Thomas worked side by side with Mr. Thomas constructing the structure. To compare this asset with Mrs. Thomas' separate assets is a case of "apples and oranges". In addition, the basis upon which the court relied in forming its opinion as to the value of the home at marriage is flawed. The court relied upon the evaluation of Jud Harvard. That appraisal is called a "complete appraisal - restricted appraisal". It purports to state the value of the property in 1982 and at the time of trial. The appraisal as to the 1982 value states that Mr. Harvard relied upon "appraisal files on other properties that I appraised in the early and mid-1980s. . ." And that Mr. Harvard ". . . researched the market and comparable sales that were transacted in the Sundance area during the early and mid-1980s." Exhibit 3, appraisal of Jud Harvard at pages 5 and 6. However, none of the underlying data regarding the 1982 valuation is set forth in the appraisal, nor was the data bank or other information relied upon by Mr. Harvard available at trial.

Rule 705 of the Utah Rules of Evidence require that: "The expert may in any event be required to disclose the underlying facts or data on cross examination." Mr. Harvard was unable to do this. The Petitioner's appraisal did not opine regarding the 1982 value because of the unreliability of any such opinion.

POINT IV.

THE COURT SHOULD HAVE VALUED AND DISTRIBUTED BERT THOMAS CONSTRUCTION COMPANY INCLUDING THE HISTORICAL BALANCE IN THE LIQUID ACCOUNTS WHICH WERE DISSIPATED BY THE RESPONDENT.

The court refused to: (1) place a value on Bert Thomas Construction Company; and (2) find that the use of the savings account during the pendency of the action by Mr. Thomas constituted dissipation. The court did find that the reduction in Mr. Thomas' income was "inexplicable". The court found that Mr. Thomas "has been a reasonably successful contractor earning, typically during the years, just prior to separation, approximately $70,000.00.) Furthermore,

> "Inexplicably and contrary to the Defendant's own testimony, the actual Bert Thomas Construction Company revenue has declined sharply since separation regardless of the trend of residential construction in Utah County and the previous Bert Thomas construction trend." See Exhibit 13 (Findings of Fact, ¶104).

It is undisputed that Mr. Thomas relied upon the cash on hand in Bert Thomas Construction Company accounts (savings and checking) during the pendency of the case. Furthermore, these funds were depleted, substantially, because of the "inexplicable" reduction in Mr. Thomas' income. Derk Rasmussen, CPA, testified

on behalf of the Petition that the Bert Thomas Construction Account balances reduced from a combined average balance of approximately $37,000.00 for the four years prior to separation, to $7,470.00 at the time of the trial. (Exhibit 9, 10 and 11.)

Mr. Thomas introduced his own testimony regarding any tools on hand for his construction company with a total combined value at the time of trial of $7,634.00, see Exhibit 63.

The Petitioner did not seek to attribute any good will to the value of Bert Thomas Construction Company (or the related leasing company). The Petitioner only sought a value for the "hard assets" which would consist of tools, inventory and cash on hand. Evidence was before the court on each of these iteMrs. It simply called for adding the amounts together.

The only difficult issue is whether or not Mr. Thomas dissipated this marital asset. In that sense it does not matter whether the parties used Bert Thomas Construction Company money as a de facto family savings account. Even if they did not, it was part of the marital asset.

Utah courts have adopted the doctrine of dissipation of marital assets. Where marital assets are used without the approval or knowledge of the other spouse, in an effort to hide those assets, or in such a manner as to benefit only one party, the court may find the dissipation of assets. Jeffries v. Jeffries, 895 P.2d 835 at 838 (Utah App. 1995). See, also, Shepherd v. Shepherd, 816 P.2d 249 (Utah App. 1994).

Furthermore, other jurisdictions have held that the use of marital assets for payment of temporary support obligations

constitutes dissipation. Lynn v. Lynn, 165 N.J. Super. 328 (N.J. App. Div. 1979), and Weiss v. Weiss, 226 N.J. Super. (N.J. App. Div. 1988).

Mr. Thomas should be required to account for the legitimate and business use of those funds. This is especially so in light of the inexplicable reduction in his income during the pendency of the case. If, as the Petitioner alleges, Mr. Thomas voluntarily reduced his self employment income and relied upon substantial account balances for his support, as well as the payment of temporary support obligations, that behavior should constitute dissipation.

CONCLUSION

The court's custody decision was clearly erroneous where it ignored its own finding regarding the best interests of the children. Similarly, the best interest of the children is a controlling conclusion not an "important" finding. Where the best interest of the children would clearly be served by the Petitioner being awarded custody, it is clearly erroneous for the court to conclude contrary to that where the past moral conduct of the custodial parent does not interfere with her parenting ability or the best interests of the children. Likewise, the character of a non-cohabitant third party was given too much weight by the trial court and does not bear upon Mrs. Thomas' parenting ability or the best interests of the children.

The alimony amount is not contested by the Petitioner. However, the duration of alimony was limited to thirty-six (36) months without any explanation or finding to support that ruling.

By providing the Respondent "credit" for payments under the temporary order, alimony actually terminated before the entry of the decree. This conclusion is not supported by the findings and is clearly erroneous. The court refused to make a finding regarding the value of Bert Thomas Construction Company, a marital asset. Sufficient facts were introduced to do so, including evidence regarding the historical balances in liquid accounts maintained by the company. These accounts were drawn down and dissipated by the Respondent during the pendency of the action. The value of the company, prior to dissipation, should have been equitably divided.

The home of the parties was substantially constructed during the marriage. It was clearly augmented, maintained and protected by Mrs. Thomas and should have been included in its entirety in the marital estate. If not, the court erred in concluding that there was a "premarital" separate portion of the fair market value of $150,000. This finding is not based upon reliable and credible evidence.

The court's conclusions regarding custody should be reversed and the matter remanded for appropriate findings and decision regarding the Respondent's visitation and parental rights. Additionally, on remand the court should equitably distribute the value of the family home and Bert Thomas Construction Company. Lastly, this court should extend the duration of alimony to a term not to exceed the length of the marriage.

DATED THIS 15 day of July, 1998.

GREEN & BERRY

Frederick Green

FREDERICK N. GREEN
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Frederick N. Green, certify that on the 16 day of July, 1998, I served a copy of the attached Brief of Appellant upon Brent D. Young, Esq. the counsel for Appellee in this matter by mailing a copy by first class mail with sufficient postage prepaid to the following address: 48 North University Avenue, P.O. Box 657, Provo, Utah 84603.

Frederick Green

FREDERICK N. GREEN
Attorney for Appellant

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

970472-CA

ANN ELIZABETH THOMAS, Appellant	:	CASE NO. 970472-CA
vs.	:	
BERT CHARLES THOMAS, Appellee.	:	ARGUMENT PRIORITY CLASSIFICATION NO. 15

APPEAL FROM A FINAL ORDER OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, THE HONORABLE LYNN S. DAVIS

BRIEF OF APPELLEE BERT CHARLES THOMAS

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ORAL ARGUMENT REQUESTED

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3 (1996). Section 78-2a-3 states in part that "[t]he Court of Appeals has appellate jurisdiction . . . over . . . appeals from the district court involving domestic relations cases."

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Cross-Appeal: Did the trial court abuse its discretion in finding Bert Thomas's income to be $69,567 for purposes of support, when the marshaled evidence does not support this finding?

Standard of Review: A trial court is granted significant latitude in making findings of fact. The Court of Appeals will only review the trial court's findings to determine if the trial court abused its discretion, or to determine if the trial court's findings were clearly erroneous. Rappleye v. Rappleye, 855 P.2d 260, 263-64 (Utah App. 1993)(citations omitted); Breinholt v. Breinholt, 905 P.2d 877,879 (Utah App. 1995).

2. Reply to Appellant's Brief: Should the trial court's findings regarding child custody, alimony, real estate division, and the value of Bert Thomas Construction Inc.(BTCI) be reversed given the fact Ann Thomas failed to marshal the evidence in support of the trial court's findings and then show that the findings were unsupported by the evidence, and given the fact the evidence was sufficient to

support the trial court's findings?

Standard of Review: In order to challenge a trial court's findings of fact on appeal, the challenger "must marshal all the evidence in support of the findings and then demonstrate that the evidence is insufficient to support the findings in question." Marshall v. Marshall, 915 P.2d 508, 516 (Utah App. 1996).

In determining custody of a child, trial judges are accorded broad discretion. "Only where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion, will [an appellate court] interpose its own judgment." Shioji v. Shioji, 712 P.2d 197, 210 (Utah 1985).

To fix alimony, at least three factors must be considered: (1) financial need of the receiving spouse; (2) the receiving spouse's ability to produce income; and (3) the ability of the payor spouse to provide support. Roberts v. Roberts, 835 P.2d 193, 198 (Utah App. 1992)(citations omitted). "If these three factors have been considered, [an appellate court] will not disturb [alimony] unless such a serious inequity has resulted as to manifest a clear abuse of discretion." Rappleye v. Rappleye, 855 P.2d 260, 264 (Utah App. 1993)(citations omitted).

For marital property, "the trial court is empowered to make such distributions as are just and equitable." Jackson v. Jackson, 617 P.2d 338, 340-41 (Utah 1980). A trial court's determination of marital property will not be disturbed absent a clear abuse of discretion. Breinholt v. Breinholt, 905 P.2d 877, 882 (Utah App. 1995).

The Court of Appeals will only review the trial court's findings to determine if the trial court abused its discretion, or to determine if the trial court's findings were clearly erroneous. Sukin v. Sukin, 842 P.2d 922, 923 (Utah App. 1992); Maughan v. Maughan, 770 P.2d 156, 159 (Utah App. 1989); Richie v. Richie, 784 P.2d 465, 468 (Utah App. 1989).

STATEMENT OF THE CASE

Nature of the Case

This cross-appeal arises from the divorce proceeding between Ann Thomas, Appellant/Plaintiff, and Bert Thomas, Appellee/Defendant. Bert Thomas cross-appeals from the Findings of fact and Conclusion of Law, and Decree of Divorce signed and dated July 9, 1997. Bert Thomas was an employee of Bert Thomas Construction Inc. (BTCI). The trial court determined Bert Thomas's gross income for child support and alimony purposes by adding to his personal income all the net income of BTCI. Bert Thomas argued that the trial court erred in determining his income to be so high. The trial court stated that Bert Thomas's contention may be correct, but "it is best left for the appellate courts to revisit the complex financial arrangements of the parties." (Finding of Fact ¶ 115, Record at 1116.) This appeal followed.

Ann Thomas argued that the trial court abused its discretion in determining child custody, alimony, real estate division, and the value of Bert's business. Bert

Thomas supports the trial court's decision regarding these issues.

Course of Proceedings

Trial was held in December 1995 and was continued to February 1996. Oral arguments were heard on April 1, 1996. The trial court's Ruling was entered August 19, 1996. In the trial court's ruling, the issue of alimony was reserved to reflect the award of custody and allow financial statements to be resubmitted. Subsequent motions were heard. The trial court issued its final Findings of Fact and Conclusions of Law, and Decree of Divorce on July 9, 1997. This appeal followed.

Disposition Below

The trial court found Bert Thomas's income to be $69,567 per year. Based on this finding, the trial court set alimony and child support. The trial court awarded custody of the two children to Bert Thomas, subject to a liberal visitation schedule. The trial court distributed the parties personal property so that the values of the assets of both parties were nearly equal. No attempt was made to place a value on BTCI other than the value of the hard assets. The hard assets (tools, equipment, materials) of BTCI were included in the equitable distribution of personal property. Bert Thomas was awarded a $150,000 value in the real estate as premarital property. After the marriage, the property appreciated. Ann Thomas received one half of the appreciated value of the real estate to compensate her for her maintenance and modest contributions to the home.

SUMMARY OF THE ARGUMENT

Bert Thomas raises two argument on appeal. First, the trial court abused its discretion in finding his income to be $69,567 per year. All of the evidence marshaled in support of the trial court does not support this finding. Second, the trial court did not abuse its discretion when it awarded Bert Thomas custody of the children, limited alimony to three years, awarded Bert Thomas a $150,000 premarital value in the home, and valued Bert Thomas Construction Inc. (BTCI). Both arguments will be summarized below.

1. Bert Thomas's income was not $69,567 per year.

The trial court relied on the testimony and exhibits of Dirk Rasmussen, Ann Thomas's expert, to find that Bert Thomas's income was $69,567 per year. However, Dirk Rasmussen imputed income to Bert Thomas which he did not have. Income which was earned by BTCI and maintained for expenses and bonding was added to Bert Thomas's personal income. It was an abuse of discretion to impute the cash reserves of BTCI as income to Bert Thomas because Bert Thomas did not receive the cash reserves and the court did not find and could not find that Bert Thomas received a personal benefit from them.

2. The trial court did not abuse its discretion in determining child custody, alimony, real estate division, and the value of BTCI.

A. Marshaling the Evidence.

The Appellant is required to marshal the evidence in support of the trial court's findings, and then show that the evidence is still insufficient to support that finding. Ann Thomas has failed to marshal the evidence. She has only reargued the evidence which supports her position. Therefore, the Court of Appeals should not disturb the trial court's findings.

B. Child Custody.

The trial court did not abuse its discretion in awarding custody of the children to Bert Thomas because the evidence showed that Bert Thomas was a competent parent who could provide for the needs of the children without deficit. The evidence showed that the influence of Mr. Sauer, Ann's lover, illuminated the deficiencies in Ann's judgment, parenting ability, and character. Specifically, Ann Thomas put her desires ahead of the needs of her children and had exposed her children to the negative influence of her lover.

C. Alimony.

The trial court did not abuse its discretion in limiting the duration of alimony to three years. Ann Thomas argued that the trial court did not articulate a change in

financial conditions that would justify limiting the duration of alimony to three years. However, this is not accurate. The trial court found that Bert Thomas's expenses would increase because he had custody of the children. The trial court also found that Ann Thomas's expenses were overstated and that she had access to income from gifted stocks and bonds. Ann Thomas even testified that some of her expenses were only temporary expenses because she was in the process of furnishing her home. Ann Thomas was employed as a school teacher by Alpine School District. The evidence showed that Ann Thomas could maintain her standard of living. Therefore, the trial court did not abuse its discretion in limiting alimony to three years.

D. Real Estate Division

The trial court did not abuse its discretion in awarding Bert Thomas a premarital value of $150,000 in the home. Before the marriage, Bert Thomas owned the Sundance real estate, cleared timber from the lot, excavated a 400 foot long access road with a 12% grade, erected extensive retaining walls, connected power, sewer, and utilities, completed 35% of the home, and purchased enough materials to build on the home for a year after being married. In essence, 70% of the construction was complete before Ann and Bert were married. The premarital value was determined to be $150,000. The value of the home had appreciated to $355,000. To compensate Ann Thomas for her modest contributions to the home,

she was awarded one half of the $205,000 appreciation value, less certain expenses. This was an equitable division.

The evidence also showed that awarding Ann Thomas one half of the premarital value could force Bert Thomas to sell his home. This could severely disadvantage the children, and would place Bert Thomas's livelihood at risk. Bert Thomas worked exclusively in Sundance. The trial court did not abuse its discretion in awarding Bert Thomas a premarital value of $150,000.

E. BTCI Value

Ann Thomas argued that the trial court failed to divide the assets of Bert Thomas Construction Inc. (BTCI). This is not accurate. The trial court divided the hard assets of Bert Thomas's construction company when it divided the personal property of the parties. The trial court found that the personal property awarded to Bert Thomas, including the hard assets of BTCI, was nearly equal in value to the personal property awarded to Ann Thomas. Ann Thomas did not attempt to value BTCI beyond its hard assets. Therefore, the trial court did not abuse its discretion.

Ann Thomas also argued that Bert Thomas had dissipated BTCI's savings account which she claimed was subject to equitable division. However, the evidence does not support this argument. Ann Thomas's own expert testified that there were no inappropriate takings or skimmings from the corporation's (BTCI) savings account.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING BERT THOMAS'S INCOME TO BE $69,567 PER YEAR BECAUSE THE MARSHALED EVIDENCE DOES NOT SUPPORT THIS FINDING.

The trial court abused its discretion in finding Bert Thomas's income to be $69,567 per year because the marshaled evidence does not support this finding. The evidence in support of the trial court's findings regarding Bert Thomas's income included: (1) Bert's tax returns; and (2) the testimony and exhibits of Dirk Rasmussen, Ann's expert witness. After marshaling the evidence, it is clear that the evidence does not support the trial court's finding.

At trial, Bert Thomas submitted tax forms and financial statements showing his W-2 income to be approximately $36,000 per year.[1] In addition, Bert Thomas had "passive" income from his leasing company of approximately $17,000 per year.[2] Bert Thomas argued that some of Dirk Rasmussen's calculations were incorrect because they did not account for taxes, or they imputed Ann Thomas's income to Bert Thomas. However, in order to challenge the trial court's findings, the evidence must be marshaled in favor of the trial court's finding and the evidence

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[1] Bert Thomas's tax documents are not included in the Addendum because they are accurately reflected by Dirk Rasmussen's Exhibit #14.

[2] On Exhibit #14 this is identified as "Lease Expense" listed under the heading "Adjustments to Net Income."

must still be insufficient to support the trial court's finding. Marshall, 915 P.2d at 516. Therefore, the focus of this argument must be on the testimony and exhibits provided by Dirk Rasmussen.

Dirk Rasmussen testified that Bert Thomas did not inappropriately take money or skim from BTCI. (Trial Transcript volume II, 126, Record at 1583.) The income that Bert Thomas took from BTCI was clearly identified and legitimate, and it was declared on his personal tax return. (Trial Transcript volume II, 133, Record at 1583.)

Exhibit #14, prepared by Dirk Rasmussen, is a summary of BTCI's financial activity from 1988 to 1994. Exhibit #14 outlines the method Dirk Rasmussen employed to calculate Bert Thomas's income. To simplify Dirk Rasmussen's methodology, the analysis will be broken down into two steps.

Step one: for each year (1988-1994) Dirk Rasmussen calculated the wages and passive income which Bert Thomas received. At the bottom of Exhibit #14, Bert's wages and passive income were broken down into four categories listed under the heading "Adjustments to Net Income." The four categories were labeled "Officer's Compensation," "Personal Cost of Goods Sold," "Lease Expense," and "Personal Payroll Expense." To determine Bert Thomas's personal income, Dirk Rasmussen added the four categories together.

Bert Thomas has no argument with step one of the methodology. The four

categories represent the personal income of Bert Thomas.

Step two: for each year (1988-1994) Dirk Rasmussen calculated the net income of BTCI, a Utah corporation, and then added the total BTCI income to Bert Thomas's personal income, even though Bert Thomas did not receive any benefit from that money. Dirk Rasmussen knew that the net income of BTCI was kept in the corporation and that Bert Thomas did not receive the money. In fact, during cross-examination Dirk Rasmussen was asked if the net income of BTCI was kept in the corporation in 1988. (Trial Transcript volume II, 131-32, Record at 1583.) Dirk Rasmussen answered "yes." (Trial Transcript volume II, 131-32, Record at 1583.) It was an abuse of discretion for the trial court to include the net income of BTCI as part of Bert Thomas's personal income when the evidence showed that Bert Thomas did not receive this money and did not receive a personal benefit from this money.

One might wonder why net income would be left in a corporation. Dirk Rasmussen stated that "there are good reasons for a construction company to maintain a good cash balance." (Trial Transcript volume II, 132, Record at 1583.) Some of the reasons a construction company may need to maintain a good cash balance is to pay bills and the corporation may need capital for bonding. (Trial Transcript volume II, 132, Record at 1583.) The only way Bert Thomas could reach the income level found by the trial court ($69,567 per year) was if he personally

used the entire cash reserves of BTCI each year. However, this would make operating BTCI impracticable. Besides, it would be inequitable to require Bert Thomas to use up the cash reserves of BTCI every year. Because the net income of BTCI was not received by Bert Thomas or used to personally benefit Bert Thomas, it was an abuse of discretion to impute the total net income of BTCI as part of Bert Thomas's personal income for child support and alimony purposes.

If the trial court is to impute corporate income to a shareholder or officer, it should be required to make specific findings of the specific economic benefit to the officer or shareholder.[3] In this case, that was not done.

Although Dirk Rasmussen could not determine why Bert Thomas's income declined in 1993-1994, there are good reasons why Bert Thomas's income declined. Foremost among these reasons is the fact that Bert Thomas has been almost a full-time father. (Trial Transcript Volume IV 55, Record at 1585.) Another reason was that Ann Thomas, who formerly performed secretarial functions, was helpful with customers on the telephone, no longer helped in the business. (Affidavit of Ann Thomas, Record at 718.) Bert Thomas assumed all of her duties when she left, in addition to the child rearing obligations. It is not consistent to assume, as the trial

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[3] Title 78-45-7.5(4)(a). Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. . . .

court has done, that Bert Thomas has been almost a full-time father, award him custody and then accept Dirk Rasmussen's testimony that Bert Thomas' income should reflect the income of a full-time contractor.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING CHILD CUSTODY, ALIMONY, REAL ESTATE DIVISION, AND BERT THOMAS CONSTRUCTION INC. (BTCI) VALUE.

The trial court did not abuse its discretion in determining child custody, alimony, real estate division, and Bert Thomas Construction Inc. (BTCI) value. In order to challenge a trial court's findings, the Appellant must marshal the evidence in favor of the trial court's findings and then show the evidence is insufficient to support the trial court's findings. Ann Thomas failed to marshal the evidence. Therefore, Ann Thomas should be prevented from challenging the trial court's findings. Even if the Court of Appeals does not follow the above argument, there was sufficient evidence to support the trial court's findings regarding child custody, alimony, real estate division, and BTCI value.

A. Marshaling the Evidence.

Ann Thomas's has failed to marshal the evidence as required by this Court in order to challenge findings of fact. Thus, Ann Thomas should be prevented from challenging those findings. This Court stated:

> In order to challenge a trial court's finding of fact of Appeal, the challenger must marshal all the evidence in support of the findings

> and then demonstrate that the evidence is insufficient to support the findings in question. We will uphold the trial court's finding of fact if a party fails to appropriately marshal all of the evidence. Marshall v. Marshall, 915 P.2d 508, 516 (Utah App. 1996)(citations omitted).

In viewing this marshaled evidence, the evidence must be viewed "in the light most favorable to the findings" and the evidence must still be "insufficient to support the findings." Watson v. Watson, 837 P.2d 1,7 (Utah App. 1992). When a party challenging findings of fact fails to marshal all of the evidence, the Court of Appeals upholds the trial court's findings of fact. Marshall, 915 P.2d at 516.

As shown in each section below, Ann Thomas has failed to marshal the evidence regarding the findings of child custody, alimony, division of real estate, and BTCI value. She did not demonstrate why the evidence, when viewed in the light most favorable to the findings, would be insufficient. Instead, Ann Thomas has simply restated the evidence she believes supports her position and reargued the original case to the Court of Appeals. In Marshall, this Court was faced with a similar situation. This Court concluded:

> Defendant has not properly marshaled the evidence but has merely recited the findings on point and then highlighted the evidence which he deems contrary to the findings. Accordingly, we do not disturb the trial court's findings and affirm the awards on appeal. Marshal, 915 P.2d at 516.

Likewise, in Schaumberg v. Schaumberg, this Court refused to disturb the trial court's findings because the appellant had "not marshaled the evidence, but had

merely reargued the evidence supporting his position." 875 P.2d 598, 603 (Utah App. 1994).

Because Ann Thomas had failed to marshal the evidence and has only reargued the evidence supporting her position, this Court should not disturb the trial court's findings of fact but should affirm the trial court's decision.

B. Child Custody

In determining permanent custody of a child, trial judges are accorded broad discretion. "Only where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion, will [an appellate court] interpose its own judgment." Shioji v. Shioji, 712 P.2d 197, 210 (Utah 1985).

Ann Thomas argued that the trial court found that it was clearly in the best interests of the children to be awarded to Ann Thomas, but then awarded custody to Bert Thomas. (Appellant's Brief 23.) However, this is a misunderstanding of the trial court's finding. The meaning of the trial court's statement must be understood in context.

The trial court stated that "this is a complicated case with no easy, clear-cut answers." (Findings of Fact ¶ 61, Record at 1131.) Based on the evaluations of Dr. Jensen and Dr. Stewart, the trial court found that both parents are competent and love their children. (Finding of Fact ¶ 59, 61, Record at 1131.) Although Ann Thomas was the primary care taker prior to separation, Bert Thomas has also

contributed and been involved with the children's activities, including "schooling, health care, religious training, and day to day activities." (Finding of Fact ¶ 65, 66, Record at 1131.) Bert Thomas was "involved with the children on a daily basis until the separation." (Finding of Fact ¶ 68, Record at 1130.) Since separation, the "children have . . . had an opportunity to rely upon their father for meeting their needs to a greater extent than existed prior to separation." (Finding of Fact ¶ 68, Record at 1130.) In fact, the "children have flourished in the relationship they have with Mr. Thomas." (Finding of Fact ¶ 68, Record at 1130.) Dr. Jay Jensen reported that there were "no apparent deficits in the ability of either parent to provide for the children's physical, emotional, and spiritual needs." (Exhibit 1, Dr. Jensen's Custody Evaluation 7.) Although Ann Thomas was the primary care giver before separation, Bert Thomas was an exceptional parent, able to provide for the children's needs without deficit. Without considering the negative influence of Mr. Sauer, this was a close call that would have been tipped in favor of Ann Thomas because she was the primary care giver.

However, Mr. Sauer was part of the environment to which the children would be exposed if Ann Thomas had been awarded custody. The appearance of Mr. Sauer into Ann Thomas's life had two significant effects which concerned the trial court. First, Ann Thomas permitted the children to be exposed to Mr. Sauer's negative influence. (Findings of Fact ¶ 79, Record at 1125.) Second, Mr. Sauer's

influence upon Ann Thomas illuminated the deficiencies in her judgment, parenting ability, and character. It showed her inability to subordinate her own pleasures to the needs of her children. This is why the trial court found Mr. Sauer to be "a very complicating factor." (Finding of Fact ¶ 71, Record at 1129.)

Because of the presence of Mr. Sauer in Ann Thomas's life, the trial court had to weigh which arrangement would be best for the children: (1) they could reside with Ann Thomas who was under the negative influence of Mr. Sauer and had exposed the children to his negative influence; or (2) they could reside with Bert Thomas who had no deficiencies in judgment, parenting ability, or character. The trial court did not punish Ann Thomas for her past moral conduct. The trial court did not award custody based upon sexual misconduct. The trial court simply weighed which arrangement was best for the children.

The trial court had the opportunity to observe the parties for several days in trial, hear their testimony, observe Mr. Sauer, hear his testimony, hear the testimony of two experts, visit with the children, and judge the personal and individual circumstances of this case. (Finding of Fact ¶ 55, Record at 1133.) Regarding Mr. Thomas, the trial court found that:

> a. Mr. Thomas is a greater source of stability in the children's lives (Finding of Fact ¶ 81, Record at 1125.)
>
> b. Mr. Thomas will not threaten the children's integration into their present environment by a change of residence. Mr. Thomas has indicated

that he plans to remain in the area where his business is established. It is the area where the children were born. He plans to continue to rear the children in these familiar surroundings. At earlier stages of the separation, Mrs. Thomas wished to move then from the area regardless of the separation of the children from their father. (Finding of Fact ¶ 81, Record at 1125.)

c. Mr. Thomas has no plans to diminish Mrs. Thomas' role in the children's lives. (Finding of Fact ¶ 81, Record at 1125.)

d. Mr. Thomas was not unfaithful in the marriage and has set a better example in that regard. (Finding of Fact ¶ 81, Record at 1125.)

e. There is no indication that Mr. Thomas would subject the children to the deleterious effects of a relationship as Mrs. Thomas has done. (Finding of Fact ¶ 81, Record at 1125.)

f. Mr. Thomas has maintained the proper orientation to his family and is more interested in the children having a meaningful relationship with both parents. (Finding of Fact ¶ 81, Record at 1125.)

Because Ann Thomas failed to marshal the evidence concerning Bert Thomas's ability to care for the children and then show the above findings were clearly wrong, the Court of Appeals should not disturb these findings. Clearly, Bert Thomas was a capable parent, able to be the primary care giver for the children. In fact, until the court ruled, the children had spent half their time with Bert Thomas. (Dr. Jensen's Custody Evaluation 4.)

Regarding Mr. Sauer, the trial court found:

a. Mr. Sauer is married and has several small children. (Finding of Fact ¶ 73, Record at 1129.)

b. During the pendency of this action, Pedro Sauer fathered a child during a time of reconciliation with his wife while still maintaining an

intimate relationship with Mrs. Thomas. (Finding of Fact ¶ 73, Record at 1129.)

c. After commencing a relationship with Mrs. Thomas, Pedro was charged with domestic violence with his wife. (Finding of Fact ¶ 73, Record at 1129.)

d. Pedro, a non-citizen of the United States, was charged with possession of a firearm/revolver at Lake Powell in the company of Mrs. Thomas. This may have also violated his work permit status in the United States. (Finding of Fact ¶ 73, Record at 1129.)

e. Pedro, in his young marriage and with several young children, has participated in other adulterous affairs. (Finding of Fact ¶ 73, Record at 1129.)

f. Based on the evidence, the court finds a link that Mr. Sauer has or will negatively impact the children. The affair has impacted the family financially. The testimony is that Mr. Sauer has not contributed financially to the family despite the frequency of his overnight stays. In addition, scarce resources have been expended on Pedro for gifts and travel.

The affair did result in a confrontation at the children's home with Mrs. Sauer. That exposure, albeit brief, was not positive for the children.

Mrs. Thomas's affair with a convicted criminal is of concern to this court. His spousal abuse charge during this time is of concern to this Court as is his illegal possession of a weapon. Such activity always places the children's mother at risk and such illegal choices can potentially, negatively affect the family. (Finding of Fact ¶ 77-78, Record at 1127.)

g. Mr. Sauer had a dramatic effect on the ultimate breakup of the Thomas family. That breakup has affected these children significantly. (Finding of Fact ¶ 78, Record at 1127.)

h. Pedro has less than desirable characteristics: immorality, social irresponsibility, his womanizing and infidelity, his criminal activity and his spousal abuse. This court cannot conceive how Pedro is a positive role model for little Joseph. Mr. Thomas offers a more stable environment to the

children. (Finding of Fact ¶ 80-81, Record at 1125.)

Ann Thomas did not marshal the evidence from the record to show these findings about Mr. Sauer were clearly wrong. Although Mr. Sauer testified that the spousal abuse charge was not prosecuted, and a plea in abeyance was entered regarding the gun charge, these and other facts were sufficient to find that Mr. Sauer provided a negative influence on Ann and the children. There was also testimony from Dr. Jay Jensen that since the arrival of Mr. Sauer, Ann Thomas had put her own needs ahead of the children. (Exhibit 1, Dr. Jensen's Custody Evaluation 10.) It is also interesting to note the threat Mr. Sauer made to Dr. Jensen. Mr. Sauer conveyed a message through Dr. Sanderson that he planned to mess up Dr. Jensen. (Trial Transcript volume I, 46, Record at 1582.)

Because Bert Thomas has the ability to provide for the children's physical, emotional and spiritual needs, because Ann Thomas has put her own needs ahead of the children, and because Mr. Sauer had exposed the children to his negative influence, it was not an abuse of discretion for the trial court to award custody of the children to Bert Thomas.

C. Alimony.

The trial court did not abuse its discretion in limiting the duration of alimony to three years. To determine alimony, at least three factors must be considered: (1) financial need of the receiving spouse; (2) the receiving spouse's ability to produce

income; and (3) the ability of the payor spouse to provide support. Roberts v. Roberts, 835 P.2d 193, 198 (Utah App. 1992)(citations omitted). "If these three factors have been considered, [the appellate courts] will not disturb [alimony] unless such a serious inequity has resulted as to manifest a clear abuse of discretion." Rappleye v. Rappleye, 855 P.2d 260, 264 (Utah App. 1993)(citations omitted).

The trial court considered the financial needs of Ann Thomas, Ann Thomas's earning capacity, Bert Thomas's ability to pay, the length of the marriage, the fault of the parties, and the standard of living of the parties. (Findings of Fact ¶ 115-127, Record at 1116.) Ann Thomas even stated in her Appellate Brief that the trial court properly considered the factors to determine alimony. (Appellant's Brief 28.)

Ann Thomas went on to argue that the trial court "inexplicably limited the duration of alimony to three years." (Appellant's Brief 28.) Ann Thomas argued that because the trial court did not make a finding "showing some anticipated change in circumstances" and because "there [was] nothing to suggest that circumstances will change in any financial sense," the trial court abused its discretion in limiting alimony to three years. (Appellant's Brief 28-29.) Ann Thomas cited to Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991), as authority to support her argument. (Appellant's Brief 29.)

There are two problems with Ann Thomas's argument. First, contrary to Ann Thomas's assertion, the trial court did make findings regarding anticipated

change in financial circumstances. Second, Thronson does not require a trial court to "articulate" a change in financial circumstances before limiting the duration of alimony.

The Trial court made several findings regarding anticipated financial changes. The trial court found that Bert Thomas's expenses would increase because he was awarded custody of the children. (Findings of Fact ¶ 124, Record at 1113.) The trial court found that Ann Thomas's expenses were exaggerated, and that her financial needs were less than what she had reported. (Findings of Fact ¶ 124, Record at 1113.) The trial court also found that Ann Thomas had access to money from gifted stocks and bonds. (Findings of Fact ¶ 124, Record at 1113.) Ann Thomas even testified that some of her expenses were only temporary because she was setting up a new home and purchased furniture, kitchen items, and household supplies. (Trial Transcript volume III, 129, Record at 1584.) Apparently, the trial court felt that Ann Thomas needed alimony for three years to set up her new life. Given these specific findings, and given the fact that Ann Thomas did not go to the Record and marshal the evidence in support of these findings and then show the findings to be clearly wrong, the Court of Appeals should not disturb these findings.

The purpose of alimony is to maintain, as nearly as possible, the standard of living enjoyed during marriage. Jeppson v. Jeppson, 684 P.2d 69 (Utah 1984). The evidence showed that Ann Thomas could maintain her standard of living. Ann

Thomas had a Bachelor of Science degree and a teaching certificate in special education from the University of Utah. (Trial Transcript volume II, 144, Record at 1583.) Ann Thomas made $25,824 per year teaching in the Alpine School District. (Finding of Fact ¶ 109, Record at 1117.) Ann Thomas had additional income from inherited stocks and bonds. (Finding of Fact ¶124, Record at 1113.) Bert Thomas, on the other hand, had less than a high school education. (Trial Transcript volume IV, 44, Record at 1585.) Bert Thomas worked in the construction business which was unpredictable from year to year. Bert Thomas was also awarded custody of the children, increasing his financial needs. (Finding of Fact ¶ 124, Record at 1113.) Although Ann Thomas experienced some temporary expenses to set up her new life, these were temporary expenses which would not continue longer than three years. Because no specific challenge has been made by citing to facts in the Record why these findings are wrong, Ann Thomas has failed to marshal and the findings should stand.

Thronson does not require a trial court to articulate anticipated change in financial circumstances before limiting the duration of alimony. Thronson held that it was an abuse of discretion to limit alimony to one year when the receiving spouse could not produce enough income to meet her financial needs, but the payor spouse, after meeting his financial needs, had a surplus of income. Id at 435. It has not been shown that Ann Thomas cannot meet her financial needs, especially in light of

her exaggerated expenses and extra money from stocks and bonds. It has not been shown that Bert Thomas, after providing for his children and meeting his financial needs, has a surplus of income. It has not been shown that limiting alimony to three years was inequitable or an abuse of discretion.

D. Real Estate Division

The trial court did not abuse its discretion in awarding Bert Thomas a premarital value of $150,000 in the home. When dividing property, "the trial court is empowered to make such distributions as are just and equitable." Jackson v. Jackson, 617 P.2d 338, 340-41 (Utah 1980). In fashioning an equitable property division, the trial court should generally award a party their separate property that they brought into the marriage or inherited during the marriage. Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988).

Prior to marriage, Bert Thomas solely and exclusively owned real estate in Sundance, Utah. (Trial Transcript volume IV, 78, Record at 1585.) Bert Thomas made improvements upon the real estate prior to marriage. He planned the building site, cleared timber, excavated and graded a 400 foot access road up the mountain, built massive retaining walls to retain the mountain from the house and road, and connected power, sewer and utilities. (Trial Transcript volume IV, 78-93, Record at 1585.) Bert Thomas also had commenced construction of a home, which was 35% complete by marriage, and stockpiled enough materials to build on the home for a

year after marriage. (Finding of Fact ¶ 33, Record at 1141.) Total construction of the project was 70% complete when Ann and Bert were married. (Trial Transcript volume III, 45-46, Record at 1584.) The value of this premarital asset was $150,000. (Trial Transcript volume III, 19-20, Record at 1584.)

Because the value of Bert Thomas's premarital asset could be determined, and because Ann Thomas made little contribution to this premarital value, it was clearly within the trial court's discretion to award Bert Thomas his premarital interest of $150,000 in the home. The trial court's decision was in accordance with Mortensen that a trial court should award a party their premarital property.

During the marriage, Ann Thomas made some modest contributions to the construction of the home including her own manual labor, the acquisition of materials, the building of retaining walls, and generally assisting Bert Thomas who acted as the general contractor for the building of the home. (Finding of Fact ¶ 36, Record at 1139.)

The only debt on the real estate was a mortgage of $27,000 borrowed after marriage. (Trial Transcript volume IV, 84, Record at 1585.) The mortgage had been reduced to approximately $17,500 at the time of trial. (Trial Transcript volume IV, 84, Record at 1585.) Although title was transferred to facilitate the security of the note payable to Mrs. Thomas's grandfather, the evidence was clear that Bert Thomas did not make a gift of the home to Ann Thomas. (Finding of Fact

¶ 34, Record at 1141.)

At the time of divorce, the real estate was worth $355,000. (Finding of Fact ¶ 44, Record at 1137.) During the marriage, the real estate had appreciated $205,000. Ann Thomas was awarded one half of this appreciated value, less certain expenses, to compensate her for the maintenance and contributions she made during the marriage. (Finding of Fact ¶ 41, 50-53, Record at 1138, 1135.) The trial court was fair and equitable because Mr. Thomas retained his premarital interest, and Mrs. Thomas was rewarded an equitable interest based on her efforts.

Ann Thomas argued that the home should have been considered a commingled marital asset because Ann Thomas enhanced, maintained, and protected the home. The authority for Ann Thomas's argument is Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). After analyzing Mortensen, it is clear that the trial court did not abuse its discretion.

Mortensen states that premarital property which has been enhanced, maintained, or protected during marriage by the other spouse should generally be divided equitably between the parties. Id at 308. However, this is just a general guideline. Mortensen clearly states that equity does not require mathematical equality. Id at 308 (citations omitted). In fact, Mortensen allows significant disparity if the disparity is based on an equitable rationale other than on the sole fact that one spouse was awarded separate gifts or inheritance. Id at 308. For example,

Mortensen states that disparity may be appropriate if the home is "utilized to provide housing for minor children or utilized in other extraordinary situations where equity so demands." Id at 308.

Ann Thomas argued that the rationale of the trial court in awarding Mr. Thomas $150,000 as premarital property was solely because she had received gifted stocks and bonds. (Appellants Brief 32.) Although this was referred to in the trial court's decision, it does not accurately reflect the trial court's rationale. The reason the trial court awarded Bert Thomas his premarital interest in the home was because of the extraordinary circumstances of this case. The trial court found that if it did not award Bert Thomas his premarital value, it "may force Mr. Thomas to sell his home, which would be much to the disadvantage of the children, and it would ignore the simple fact that he had a substantial asset for which he had worked for many years before the marriage and acquired before the marriage." (Finding of Fact ¶ 35, Record at 1140.) Selling the home would also adversely impact Bert Thomas's livelihood, and effect his social and political opportunities for the following reasons:

a. Mr. Thomas has lived in Sundance since five years before the marriage although not continuously until the home was habitable. (Finding of Fact ¶ 35, Record at 1140.)

b. Since the fall of 1983, he has lived there continuously and is very much involved in the social and political activities there. For example, he is the Fire Chief, member of the North Fork Special Services District, and Vice

Chairman for three years. He is a past president of the Homeowners' Association, Chairman of the Architectural Committee, and he drafted the Architectural Covenants of the SCAPO subdivision. (Finding of Fact ¶ 35, Record at 1140.)

c. Mr. Thomas earns his livelihood and established his business at Sundance, and has earned his livelihood almost exclusively in that community since 1977. (Finding of Fact ¶ 35, Record at 1140.)

d. Given his income, it is not probable that he could acquire other accommodations in that community. (Finding of Fact ¶ 35, Record at 1140.)

e. It would prove far more difficult for him to maintain his maintenance contracts if he were to leave the area. (Finding of Fact ¶ 35, Record at 1140.)

In accordance with Mortensen, the trial court considered the extraordinary circumstances of this case, and found that equity did not justify awarding Ann Thomas an interest in the premarital value of the real estate. Because Ann Thomas failed to marshal to assault the findings which established the extraordinary circumstances of this case, and then show that the decision was clearly wrong, the Court of Appeals should not disturb these findings on appeal.

Ann Thomas also argued that the evidence did not support a finding that the premarital value of the home was $150,000. (Appellant's Brief 32-33.) Judd Harward, an appraiser who had performed appraisals in Sundance for over twenty years, (Trial Transcripts volume III, 7, Record at 1584), testified that the total value of the real estate prior to marriage was $150,000. (Exhibit 31, 6-7.) This figure included a lot value of $70,000, site improvement (driveway, retaining walls, septic

tank, water line, and electrical service) value of $10,000, and a 35% completed home value of $70,000. (Trial Exhibit 31, 6-7.) The trial court accepted Judd Harward's value of the premarital home. (Findings of Fact ¶ 48, Record at 1135.)[4]

Ann Thomas argued that Judd Harward's testimony could not be used. She claimed that Judd Harward testimony violated Utah Rules of Evidence 705 because the data he used to make his calculations were not available at trial. (Appellant's Brief 32-33.) Utah Rule of Evidence 705 states that:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless, the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 705 is not a reason for the Appellate Court to remand the case for five reasons. First, Ann Thomas did not make this argument to the trial court. Ann Thomas had an opportunity to object and argue before the trial court that Rule 705 was not satisfied, but she did not. Because she did not raise it, she waived it. Second, neither counsel nor the trial court requested or required Judd Harward to disclose the underlying facts or data used. Third, Rule 705 implies that an expert is not under an obligation to disclose his underlying facts or data until requested to do

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[4] The trial court rejected Ann Thomas's expert because the photos of the comparables were wrong, the comparables were not visited, the quality of materials and workmanship of the comparables were considerably different, and did not consider the unique aspect of the Sundance community. (Finding of Fact 13-14, Record at 1146.)

so. During cross-examination, Ann Thomas never required Judd Harward to make his data available. (See testimony of Judd Harward, Trial Transcript volume III, 6-76, Record at 1584.) Fourth, "disclosure" only means that the expert must identify data he employed to calculate his opinion, it does not require the expert to bring the data to the courtroom. Fifth, during cross-examination, Judd Harward did disclose the underlying facts and data he used. Specifically, Judd Harward testified that his data was based on his appraisals, appraisals of other experts in the area, multiple listing information, price information from Realtors in the area, and extensive experience in the Sundance area. (Trial Transcript volume III, 51-52, Record at 1584.) There was nothing magical about his data; it contained the same information which was available to any appraiser. (Trial Transcript volume III, 52, Record at 1584.) For these five reasons, the trial court did not abuse its discretion in using the testimony of Mr. Harward to find that the premarital value of the home was $150,000.

E. BTCI Value.

The trial court did not abuse its discretion in valuing and distributing the assets of Bert Thomas Construction Inc. (BTCI). Ann Thomas argued that the trial court refused to place a value on BTCI. (Appellant's Brief 33.) This is not accurate. The trial court did value and divided the assets of BTCI. Ann Thomas did not offer sufficient evidence to make a business valuation of BTCI. (Finding of

Fact ¶ 31, Record at 1142.)

The value of the hard assets of BTCI totaled $7,634. (Exhibit #63.) Ann Thomas's argued that the trial court should have equitably divided these assets. This argument is surprising because the trial court did equitably divide these assets. The trial court awarded Bert Thomas the hard assets of BTCI and determined the value to be "nearly equal, fair and equitable" to the personal property awarded to Ann Thomas. (Finding of Fact ¶ 24-27, Record at 1144.) The trial court did not "refuse to place a value on Bert Thomas Construction Company [BTCI]." (Appellant's Brief 33.) The trial court valued the hard assets of BTCI and equitably divided them.

Ann Thomas also argued that the liquid assets of BTCI were subject to equitable division, but were dissipated by Bert Thomas. The only evidence Ann Thomas introduced on this issue was that BTCI's savings account averaged $37,000 for the four years prior to trial, but only $7,364 at trial. (Appellant's Brief 34.) BTCI's savings account does not represent the assets or value of BTCI. BTCI receivables were generally deposited into a BTCI savings account where they earned interest. When these funds were needed to pay various business expenses, they were transferred to BTCI's checking account. (Exhibit 36, 37.) The account balance fluctuated significantly from month to month. (Exhibit 7.) Clearly, the savings account on any given day did not represent the assets of BTCI. The trial

court was correct in finding that "the amount in a corporate savings account on a given date is not controlling. To determine the value of the marital asset, one must determine the value of the company." (Finding of Fact ¶ 31, Record at 1142.) However, Ann Thomas offered no evidence to value BTCI beyond its hard assets. Because Ann Thomas offered no other evidence to value BTCI, the trial court did not abuse its discretion in finding that there was insufficient evidence to award Ann Thomas one half of an average monthly balance in BTCI's savings account.

Ann Thomas also argued that Bert Thomas dissipated this marital asset. However, Ann Thomas failed to marshal the evidence on this issue. Her own expert testified that the money earned by Bert's corporation was appropriately accounted for. (Trial Transcript volume II, 126, Record at 1583.) There was no skimming or inappropriate takings from Bert Thomas's corporation. (Trial Transcript volume II, 126, Record at 1583.) Bert Thomas's wages and personal draws after separation were the same even two years before separation. (Trial Transcript volume II, 135; Exhibit 14, Record at 1583.) Clearly, Bert Thomas was not taking money from BTCI for any improper or personal purpose, which was not declared on his personal return. There is no evidence to show otherwise.

CONCLUSION

The Court of Appeals should affirm the trial court's findings regarding the issues of child custody, alimony, real estate division, and the value of BTCI.

Because Ann Thomas failed to attempt to marshal the evidence and because Mr. Thomas had to reply the issue of attorney's fees should be remanded to the trial court for an award of Bert Thomas's reasonable attorneys fees. The Court of Appeals should reverse the trial court's finding that Bert Thomas's income was $69,567 per year and remand for recalculation of child support.

Dated this 15 day of September, 1998.

Brent D. Young

BRENT D. YOUNG

MAILING CERTIFICATE

I hereby certify that on this 15 day of September, 1998, I caused to be mailed, first-class mail, postage prepaid, the foregoing Brief of Appellee to Frederick N. Green, Attorney for Appellant, at the following address:

Frederick N. Green
GREEN & BERRY
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Brent D Young
BRENT D. YOUNG

ADDENDUM

A. Findings of Fact and Conclusions of Law dated 7 July 1997

B. Decree of Divorce dated 8 July 1997

C. Ruling on All Outstanding Motions and Order to Show Cause dated 13 January 1997

D. Ruling dated 19 August 1996

E. Trial Exhibit #14

F. Trial Exhibit #15

G. Trial Exhibit #16

H. *Thronson v. Thronson*, 810 P.2d 428 (Utah 1991).

I. *Mortensen v. Mortensen*, 760 P.2d 304 (Utah 1988).

J. *Schaumberg v. Schaumberg,* 875 P.2d 598 (Utah App. 1994).

K. *Marshall v. Marshall*, 915 P.2d 508 (Utah App. 1996).

L. Trial Transcript Volume II, 132, Record at 1583.

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COPY TO CLIENT 8-13-97

FILED
IN THE DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
1997 JUL -9 PM 3:00

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

ANN ELIZABETH THOMAS,

Plaintiff,

vs.

BERT CHARLES THOMAS,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 934402503

Judge Lynn W. Davis
Comm. Howard Maetani

The above-entitled matter came on regularly for trial commencing December 5, 1995, and following an adjournment convening again February 26, 1996. The Honorable Judge Lynn Davis presided. The Plaintiff and the Defendant were present in person and represented by their attorneys, Frederick N. Green appearing for the Plaintiff and Brent Young appearing for the Defendant. Each party presented evidence and testimony, and the Court entertained the testimony of the parties and witnesses. Counsel argued the following contested issues: 1) division of personal property; 2) division of real property and value of real property and marital versus premarital property; 3) child custody and visitation; 4) child support; 5) alimony; 6) pension, retirement issues, business assets; and 7) miscellaneous issues. Final argument was heard by the Court on April 1, 1996, and a

final hearing was held on November 8, 1996 to resolve remaining issues. The Court, having reviewed the file, the exhibits, and the arguments of counsel based thereon and good cause otherwise appearing, the Court now makes and enters its,

FINDINGS OF FACTS

1. The parties were married on July 17, 1983.

2. Each of the parties resided in Utah County for more than three (3) months prior to the filing of the Complaint.

3. The parties have two (2) minor children of the marriage: Joseph, born July 12, 1986, age ten (10); and Katherine, "Katie", born July 8, 1989, age seven (7).

4. The parties separated and began to live separate and apart on March 21, 1993.

5. The Plaintiff is thirty-eight (38) years old and has earned a Bachelor of Science degree, prior to her marriage to the Defendant, from the University of Utah.

6. The Plaintiff presently teaches special education for the Alpine School District.

7. The parties' children also go to school in the Alpine School District at the same school in which the Plaintiff teaches.

8. The Defendant is a self-employed contractor and builder licensed as such in the State of Utah. He is a high school graduate with some plans to continue his education.

9. During the marriage, the parties have acquired personal property and improved real property.

PERSONAL PROPERTY

10. The general purpose of property division is to allocate property "in a manner which best serves the needs of the parties and best permits them to pursue their separate lives." The overriding consideration in property division is "that the ultimate division be equitable -- that property be fairly divided between the parties given their contributions during the marriage and their circumstances at the time of the divorce." Burt v. Burt, 799 P.2d 1166, 1171.

11. For the purposes of asset consideration this Court accepts the following definition:

> Marital property is all property acquired during marriage except property acquired by gift or inheritance and it "encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived." Dunn v. Dunn, 802 P.2d 1314, 1317 - 1318.

12. It is clear that statutory law confers broad discretion upon the trial Court in the division of property, real and personal, regardless of its source or time of acquisition.

13. During the course of the marriage, and prior thereto, the Plaintiff received annual gifts, principally from her grandfather.

14. These gifts were always in cash or in kind and, when in the form of stock, were conveyed to the Plaintiff individually and not the Defendant as well.

15. The practice continued through the marriage and existed among Mrs. Thomas' siblings likewise.

16. Since the separation of the parties, gifts have been made in trust for the benefit of the parties' minor children.

17. All of these gifts have always been maintained in separate accounts or in separate stock accounts or certificates, and have not been augmented, supplemented, added to, protected or enhanced by the Defendant or from earnings from either party during the marriage.

18. As such, they are classic cases of separate property which have maintained their separate identity and should be awarded to the Plaintiff, except for those funds, which have been designated in trust for the children which should be maintained by the Plaintiff, in trust for the children and made available to them consistent with the intent of the donor.

19. Subsequent to separation, the Defendant prepared a document entitled "Personal Property Settlement Between Ann Thomas and Bert Thomas," dated February 5, 1994.

20. The Court finds the parties discussed the final resolution of the division of personal property and tools. Mr. Thomas drafted an agreement. Mrs. Thomas made changes to that agreement and signed it. Property was delivered and accepted pursuant to the agreement. No discussion was had about that agreement for a period of approximately one year. Based upon the authority of the agreement, Mrs. Thomas even sold a vehicle.

21. Upon review, and based upon the testimony of the parties, the Court finds that the "Settlement" is ambiguous because it does not state whether it is a settlement of all

property rights or only temporary property rights.

22. Furthermore, the agreement was executed without the benefit of counsel, and its enforcement would result in a potentially significant and substantial inequity between the parties. Additionally, the circumstances surrounding the agreement and its consideration are heavily disputed.

23. Rather the Court relied upon Exhibit 24 of the Plaintiff which lists, in detail, the personal property in each party's possession, what property would constitute gifts to either party and the relative values of the property.

24. Therefore, it would be reasonable for the parties to be awarded the personal property presently in their possession and, in addition and not withstanding that, that the Plaintiff be awarded the following items of personal property:

(a) Kachina doll;

(b) Twig outdoor furniture (five (5) pieces) or the Adirondack outdoor furniture (four (4) pieces), at the election of the Defendant;

(c) One (1) of the Bearnaise Mountain Dog puppies, or the financial equivalent;

(d) The oriental rug;

(e) The antique toy trucks given to the Plaintiff by her father;

(f) The wooden bowl;

(g) One (1) copy of the home videos.

25. Plaintiff requests that the Court place a monetary

value on Defendant's tools and then factor that value into the equitable division of the personal property. This Court carefully considered the agreement/stipulation of the parties, rejected it in part, and fashioned an equitable division of the personalty under the circumstances. Weighing all factors, the Court believes it to be equitable and fair.

26. In this regard, the Court makes a few observations. First, this Court finds that Plaintiff has minimized the value of some of her items and exaggerated the value of some of Defendant's items. Some tools were purchased prior to the marriage and some after. Those acquired during the marriage are generally worn out or in disrepair. This Court awarded Mr. Thomas those tools, calculating the values of the assets of both parties to be nearly equal, fair and equitable.

27. Absolute mathematical precision is impossible. For example, some items given to the Plaintiff, such as the Oriental rug, maintain value over time much better than tools which become worn out by day to day use in the construction industry.

DISSIPATION OF ASSETS

28. Plaintiff claims that at the time of the separation, Defendant had approximately $40,000 on account in the Bert Thomas, Inc.'s Savings Account and that she is entitled to one-half as a marital asset. Plaintiff further argues that the account was depleted to approximately $7,000 at the time of the trial, and that the Defendant was the sole beneficiary (i.e. he used the funds to live on and meet his obligations under the

temporary order).

29. Defendant argues that the subject account was an operating fund for the company and the amount in the account fluctuated significantly from month-to-month; the amount of money in an operating business account at any particular time has no particular significance.

30. These parties set up a complex financial system to operate the Bert Thomas Construction, Inc. business. The best this Court can glean, the flow of money in and out of the company is represented in the flow chart attached (Exhibit No. 37).

31. Defendant is accurate that the amount in a corporate savings account on a given date is not controlling. To determine the value of the marital asset, once must determine the value of the company. There was insufficient evidence presented at trial to arrive at the value of Bert Thomas Construction, Inc. and therefore there was an insufficient basis to award Plaintiff assets to assess financial obligations. This Court did not make a finding of value of Bert Thomas Construction Inc. and cannot make such a determination by looking solely at a savings account as of a given date.

REAL PROPERTY

a. Marital Versus Separate Property

32. Utah's appellate courts have long held that once a trial court has determined marital property, the court may distribute it equitably, regardless of which party's name appears on the title. Huck v. Huck, 734 P.2d 417, 420 (Utah 1986). "The

trial court is empowered to make such distributions as are just and equitable, and may compel such conveyance as are necessary to that end." Jackson v. Jackson, 617 P.2d 338, 340 - 41 (Utah 1980).

33. The Court finds that Mr. Thomas, solely and exclusively, owned real estate in Sundance, Utah before the parties were married. He owned the real estate free from any type of encumbrance. (The subject property is described in Plaintiff's Exhibit 23.) The Court finds that Mr. Thomas commenced construction of a home on the property, and that it was framed up and many of the materials had been purchased before the parties were married. In addition, it is important to note that a lengthy access road had been constructed and power and sewer utilities had been placed on the premises. The Court finds Mr. Thomas continued to work on the home after the marriage, using materials previously obtained. This property ultimately became the parties' marital residence. Approximately one to one and one-half years after they were married, the parties obtained $27,000 from Mrs. Thomas' grandfather. This note was secured by a mortgage which had been reduced to approximately $17,000 at the time of trial (Exhibit 23).

34. The note was signed by both parties, as was the mortgage. Title was transferred to facilitate the security of the note payable to Mrs. Thomas' grandfather. The evidence is clear that Mr. Thomas did not make a gift of the home to Mrs. Thomas.

35. Mr. Thomas had a significant asset before the marriage and was able to use assets previously acquired to help complete the home for at least a year. Therefore, it would be inequitable for the Court to divide the equity in the home equally, and permit Mrs. Thomas to have all of her stocks and bonds. It would not be equitable or consistent for the Court to award Mrs. Thomas all of her premarital property and her gifts and inheritance and award her one-half of Mr. Thomas' premarital property. That approach may force Mr. Thomas to sell his home, which would be much to the disadvantage of the children, and it would ignore the simple fact that he had a substantial asset for which he had worked for many years before the marriage and acquired before the marriage. It would also have a significant adverse effect upon his employment opportunities at Sundance for the following reasons:

a. Mr. Thomas has lived in Sundance since five years before the marriage, although not continuously until the home was habitable;

b. Since the fall of 1983, he has lived there continuously and is very much involved in the social and political activities there. For example, he is the Fire Chief, member of the North Fork Special Services District, and Vice-Chairman for three years. He is a past president of the Homeowners' Association, Chairman of the Architectural Committee, and he drafted the Architectural Covenants of the SCAPO subdivision.

c. Mr. Thomas earns his livelihood and established his business at Sundance, and has earned his livelihood almost exclusively in that community since 1977.

d. Given his income, it is not probable that he could acquire other accommodations in that community.

e. It would prove far more difficult for him to maintain his maintenance contracts if he were to leave the area.

36. Commencing sometime during the period of cohabitation and thereafter, the Plaintiff made some modest contribution to the construction of the home including her own manual labor, the acquisition of building materials, the building of retaining walls, and generally assisting the Defendant who acted as the general contractor for the building of the home.

37. As stated above, generally, parties should retain their separate property that they brought into the marriage or that they might inherit during the marriage.

38. The ownership of the premises and the state of improvement of the lot prior to marriage is not significantly disputed. The value of the asset prior to marriage can be established. It would be inequitable to grant Plaintiff an interest for which she never worked for, nor contributed to.

39. The building lot had been conveyed to Mr. Thomas and significant improvements had been made prior to any contribution by Mrs. Thomas. This Court may always adjust property distribution to achieve an equitable result.

40. The Court values Mr. Thomas' premarital asset at $150,000. The Court specifically rejects Mr. Free's claim that the 1982 value could not be ascertained because of the credibility problems listed below. That consists of the building lot and its improvements including the foundation for the home, the partially framed house, the lengthy access road which was constructed and other improvements such as sewer, power, partial retaining walls, and the stockpiled supplies.

41. Beyond that interest, Mrs. Thomas is then entitled to an equitable share because of her maintenance and contributions. This appears to be a fair, just and equitable result because Mr. Thomas retains his clearly premarital interest, and Mrs. Thomas retains an equitable interest based on her efforts. This equitable determination rejects both the position of Plaintiff (commingling) and the position of Defendant (exclusive ownership together with all appreciation).

b. Valuation of the Real Property

42. Trial courts are provided considerable discretion in establishing the value of real property. Such valuations are presumed valid and will not be overturned absent a clear abuse of discretion. Morgan v. Morgan, 795 P.2d 684 (Utah Ct. App. 1990). As stated in Morgan at 691, the trial court "is entitled to give conflicting opinions whatever weight it deems appropriate." There are conflicting opinions on this case. The Court establishes the value of the Sundance property as of the date of the trial.

43. The Plaintiff introduced evidence based upon the real property appraisal conducted by Gary Free and Associates which is based upon the "comparable sales approach" and concludes that the home has a current fair market value of $500,000.

44. The Defendant introduced evidence based upon an appraisal conducted by Jud Harward who concluded that the home had a current fair market value of $355,000.

45. The Court is disinclined to accept the appraisal of the home at Sundance by Mr. Free, Plaintiff's expert, for the following reasons:

a. Plaintiff's expert was uncertain of the comparables and some of the pictures of the "comparables" did not even correspond to the comparables which were relied upon. While this does not constitute a dispositive defect, it does reflect upon the accuracy of the appraisal and the credibility and integrity of the report.

On this issue, the Court agrees with Mr. Thomas. The Court is not impressed with the idea that the photos of the comparables are not required and therefore of little importance. In the Court's view, an appraisal is a comparison of properties. The photograph is a "snapshot" of the real property. If it is wrong, the appraisal could be misleading.

b. The comparables were not visited.

c. The quality of the materials and quality of workmanship in the comparables were considerably different

the area. He testified concerning the significant differences in the quality of those properties compared to the Thomas cabin.

47. Next, the Court turns to the appraisal of Jud Harward. It is clear that Mr. Harward had considerable experience of appraising in Utah County area and in appraising property in Sundance.

48. The Court accepts Mr. Harward's appraisal based upon such experience and observations in appraising real estate in Sundance. Accordingly, the Court accepts the value of the cabin at $355,000.

49. The Court must consider costs associated with sale. It is undisputed that there are problems with the cabin before it could be marketable, including boundary line problems. There also are costs of repair. A real estate commissioner would be approximately six percent (6%), plus closing costs (.06 x $355,000 = $21,300). Mr. Thomas testified that the sales cost would be approximately $31,900. The mortgage of approximately $17,000 would have to be paid.

$355,000	Sale Price
$ 17,000	Mortgage
$ 31,900	Commission and Realtor Fees
$306,100	

50. The value of Mr. Thomas' interest at the time of marriage was $150,000. The Court has already addressed the issue of natural growth/appreciation. A fair division of the equity forces the Court to reject the appreciation factor given the

than those used by Mr. Thomas. It is undisputed, specifically, that the materials to construct the Thomas cabin had been previously used. The materials in the comparables were new. For example, the kitchen cabinets in the Thomas cabin are made of plywood.

d. Comparison of the garages were not accurate, as well as other items such as number of fireplaces, concern for avalanche danger, and degree of exposure to sun.

e. The Thomas home is not complete. It requires maintenance and repairs to make it marketable. The "Free" appraisal did not give sufficient weight to the true condition of the Thomas cabin.

f. Mr. Free and his associates had considerable difficulty in even locating the correct properties.

g. Of significant concern to this Court was Mr. Free's failure to address the extant property line and easement problems associated with the property. Such problems can significantly delay the sale of a property and the Court is aware that title problems not only affect the marketability of a property, but also affect its value.

h. The "Free" appraisal also failed to address the difficulty of accessibility to the subject property and the significance of view.

46. Mr. Thomas testified of his personal knowledge of Plaintiff's comparables because he was acquainted with each, and had performed work in many of the comparables and other cabins in

contributions of the parties during their marriage and their circumstances at the time of the divorce. Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). Accordingly, Mrs. Thomas' equity is calculated as follows ($306,100 - $150,000 /2).

51. Therefore, the Court awards Mrs. Thomas an interest in the home at the value of $78,050.

52. The Court grants the Defendant the option to either purchase the Plaintiff's interest in the cabin or sell the cabin and divide the proceeds consistent with the above findings of fact.

53. The election to purchase the cabin should be exercised within 120 days from date hereon. Upon expiration, the cabin should be placed on the market for sale, with the parties cooperating in its listing, showing, selling and closing.

the area. He testified concerning the significant differences in the quality of those properties compared to the Thomas cabin.

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$306,100	

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III.

CHILD CUSTODY AND VISITATION

54. As indicted above, the parties have two minor children: Joseph and Katie. This Court is charged with the duty respecting the future care and custody of Joseph and Katie as it deems appropriate.

55. This trial court is given broad discretion in making child custody awards. Sukin v. Sukin, 842 P.2d 922, 923 (Utah Ct. App. 1992). This Court has had the opportunity to witness the parties, to hear all of the evidence, to visit with the minor children and to judge the personal and individual circumstances of this case.

56. As provided by statute, "in awarding custody, the Court shall consider, among other factors the Court finds relevant, which parent is most likely to act in the best interests of the [children], including allowing the child frequent and continuing contact with the noncustodial parent as the Court finds appropriate." §30-3-10(2) Utah Code Ann. (1953 as amended). In determining custody, the Court is to consider the best interests of the child and the past conducts and demonstrated moral standards of each of the parties. §30-3-10, Utah Code Ann. (1953 as amended).

57. This Court shall consider the "best interests of the child" as an important factor, but will also consider past conduct and moral standards of the parties and which parent will act in the child's best interest and other relevant factors such

as keeping the siblings together, and each child's bond with each parent.

58. It is apparent that Joseph and Katie get along well, participate in activities together, and are a mutual support of each other. As noted in Dr. Stewart's report, there is a firm sibling bond. Accordingly, it is in their best interests not to be separated. This Court did not inquire as to the preference of Joseph or Katie because neither child is sufficiently mature of age and capacity to reason so as to form an intelligent preference regarding legal custody.

59. Both parents truly have a sincere desire for custody. This Court has carefully examined a custody evaluation report of Dr. Jay P. Jensen, a clinical psychologist, dated March 21, 1995. He, by stipulation, was appointed friend of the Court. In addition, the Court carefully examined the custody evaluation report of Dr. Elizabeth B. Stewart, also a clinical psychologist, dated December 1, 1995. Both of these fine professionals testified at trial. Dr. Stewart had the benefit of Dr. Jensen's report when making her report and adopted/supported some of his findings and conclusions and criticized others. This Court would have favored an analysis which did not rely upon or disparage that of the parties' stipulated friend of the Court. The Court has relied in part on both evaluations for guidance, but the Court does not accept either in total.

60. The two custody evaluations performed in this case appear to agree on a number of important points and disagree on

some critical issues. Dr. Jensen recommended that custody be given to the father or, in the alternative, a modified joint custody arrangement be worked out. Dr. Stewart recommends that custody be awarded to Mrs. Thomas.

61. This is a complicated case with no easy, clear-cut answers. Both of these parents seek custody, are competent and definitely love their children. Both have personal, professional lives which somewhat complicate custodial arrangements. The children have been isolated in their Orem neighborhood because they attend a non-neighborhood school, Orchard Elementary, where their mother teaches. In addition, they have been somewhat isolated in their Sundance neighborhood because of the paucity of playmates and distance between cabins, etc.

62. Ann Thomas was the primary caretaker for the children prior to the parties' separation.

63. Prior to the parties' separation and since, Ann Thomas has performed well as the mother of the children.

64. The Defendant has also acknowledged that Ann Thomas is a competent, caring mother who has indeed been the primary care giver for the children throughout their lives.

65. As the primary care giver of the children, Mr. Thomas has seen to their day to day needs, typically been the parent who has been home when they return from school, assisted the children with their school work, made sure the children received appropriate medical and dental care, typically transported the children when such was necessary, entertained the children,

disciplined the children, and so forth. Mr. Thomas has also contributed and been involved in these activities. The Court finds Mr. Thomas has been involved with the children's schooling, health care, religious training, and day to day activities. He has attended parent/teacher conferences, he has taken the children to doctors, dentists and other activities.

66. The children interact with Ann Thomas as their primary care provider and have established confidence in her as their primary care provider.

67. The parties have, since their separation in March of 1993, entered into an arrangement of shared custody. The Court finds the arrangement which has been heretofore set forth in prior Court orders has provided that the time the children spent with each parent has been approximately equal. The Court finds that for approximately half of the life of the youngest and one-third of the life of the oldest child, that they both have enjoyed a relationship with both of their parents wherein they have shared approximately equal time. The arrangement has worked somewhat well as these arrangements go, but the children have suffered from some instability and moving back and forth.

68. The Court finds that Mr. Thomas had been involved with the children on a daily basis until the separation. Mr. Thomas conducts business out of his home which has permitted him to be involved in the children's daily activities since they were born. Since the parties' separation, the children have also had an opportunity to rely upon their father for meeting their needs to

a greater extent than existed prior to separation. The children have flourished in the relationship they have with Mr. Thomas.

69. The children's social needs are being principally met thought their associations at school.

70. The Defendant's residence in Sundance, Utah County, does not afford a substantial amount of peer interaction for the children, but they have close friends there. In addition, the children have not established close friendships in their mother's neighborhood.

71. The appearance of Señor Pedro Sauer in an emotional and sexual relationship with Ann Thomas during this marriage is a very complicating factor.

72. Mr. and Mrs. Thomas separated in March of 1993. Mrs. Thomas, unbeknownst to Mr. Thomas, had commenced a relationship with Pedro in October or November of 1992. Mr. Pedro Sauer was then, and was at the time of trial, a married man.

73. From all the trial testimony and reports of the evaluators, what facts to do we glean about Pedro?

a. He is not a citizen of the United States of America.

b. He is Brazilian and has entered the United States by virtue of a work permit.

c. He is a martial arts instructor in Ju Jitsu at a health club.

d. He is married, and his wife and small children live in Orem, Utah. He has several small children.

e. It is somewhat unclear when Pedro entered into a sexually intimate relationship with Mrs. Thomas, but the romantic relationship commenced in 1992. Mrs. Thomas reported to Dr. Jensen that she met Pedro in October and had a relationship by November of 1992. Mr. Thomas believed the relationship had started as early as June of 1992.

f. During the pendency of this action, Pedro fathered a child during a time of reconciliation with his wife, while still maintaining an intimate relationship with Mrs. Thomas.

g. After commencing a relationship with Mrs. Thomas, Pedro was charged with domestic violence with this wife.

h. Pedro, a non-citizen of the United States, was charged with possession of a firearm/revolver at Lake Powell in the company of Mrs. Thomas. This may have also violated his work permit status in the United States.

i. Pedro, in his young marriage and with several young children, has participated in other adulterous affairs.

j. He now has a divorce pending in the Fourth District Court which is set for September of 1996.

k. His wife enjoyed entry into the United States because of the work status of Pedro. A divorce will result in her deportation from the United States and her re-entry is in question. The future custodial status of their children is unknown. This could significantly affect the Pedro/Mrs. Thomas dynamics if some or all of the children

remain here, particularly any child born in the United States and who would automatically enjoy citizenship.

l. Mrs. Thomas reported to Dr. Jensen that her relationship with Pedro "had a dramatic effect" on the ultimate breakup of the Thomas family.

m. Mrs. Thomas perceives Pedro as "a very positive male role model. . ." (Report of Dr. Jensen, p. 10.)

74. The Pedro/Ann Thomas relationship has continued for several years and while no one can predict the future, it appears to this Court that it is their intention to marry when they are legally able. As mentioned above, his divorce trial is scheduled for September of 1996.

75. This Court had hoped Mr. Sauer's divorce would have been completed earlier in order to evaluate his true motives, and then to have evaluators thoroughly and fully consider his relationship to these minor children, his commitment to Mrs. Thomas, his relationships with any other women, and his obligations to his children and his ex-wife.

76. The Court has entertained the testimony of Pedro Sauer and his wife. He represented himself as a responsible individual, but is not. He has undertaken activity which would be considered detrimental to the Thomas children.

77. Based upon the evidence of Mr. and Mrs. Sauer and others, the Court does find a "link" or connection that would suggest that the relationship between the Plaintiff and Mr. Sauer has negatively impacted the children, or will negatively impact

the children in the future.

78. The evaluators can make no "objective" link between the "affair" and its impact upon the children. The fact of the matter is that they are young and my not appreciate the consequences of a fairly discreet sexual affair, but the relationship has affected the family:

a. The affair has impacted the family financially. The testimony is that Mr. Sauer has not contributed financially to the family despite the frequency of his overnight stays. In addition, scarce resources have been expended on Pedro for gifts and travel.

b. The affair eventually resulted in a confrontation at the children's home with Mrs. Sauer. That exposure, albeit brief, is not positive for the children.

c. Mrs. Thomas's affair with a convicted criminal is of concern to this Court. His spousal abuse charge during this time is of concern to this Court as is his illegal possession of a weapon. The weapon was possessed in the company of Mrs. Thomas on a trip to Lake Powell and was attempted to be retrieved at a time of confrontation. Such activity always places the children's mother at risk and such illegal choices can potentially, negatively affect the family.

d. Mr. Sauer "had a dramatic effect" on the ultimate breakup of the Thomas family. That breakup has affected these children significantly, dramatically and in a myriad

of ways.

79. The reason this case is so troubling is because of Pedro Sauer and his negative influence on the family. Absent his entry, and his influence, it is clearly in the best interests of the children to be awarded to Ann Thomas. With Pedro in the picture, which he is and intends to be, it is not in the best interests of the children to be in the home and subjected to the negative influence and example of Pedro.

80. This Court is profoundly concerned with Mrs. Thomas' observation that Pedro is "a very positive role model." She has been duped by his suave, debonair and romantic influences and has overlooked his less than desirable characteristics: immorality, social irresponsibility, his womanizing and infidelity, his criminal activity and his spousal abuse. This Court cannot conceive how Pedro is a positive role model for little Joseph. To that extent Ann Thomas does not have the best interests of the children at heart.

81. Mr. Thomas offers a more stable environment to the children. On the issue of stability, the Court concurs with Dr. Jensen that:

a. Mr. Thomas is a greater source of stability in the children's lives (Exhibit 1 page 14, Conclusions and Recommendations).

b. Mr. Thomas will not threaten the children's integration into their present environment by a change in residence. Mr. Thomas has indicated that he plans to remain

in the area where his business is established. It is the area where the children were born. He plans to continue to rear the children in these familiar surroundings. At earlier stages of the separation, Mrs. Thomas wished to move from the area regardless of the separation of the children from their father.

c. Mr. Thomas has no plans to diminish Mrs. Thomas' role in the children's lives.

d. Mr. Thomas was not unfaithful in the marriage and nas set a better example in that regard.

e. There is no indication that Mr. Thomas would subject the children to the deleterious effects of a relationship as Mrs. Thomas has done.

f. Mr. Thomas has maintained the proper orientation to his family and is more interested in the children having a meaningful relationship with both parents.

82. Based upon the above, the Court believes it is in the long term best interests of the children to award their custody to Mr. Thomas subject to generous, liberal and frequent visitation by Mrs. Thomas. This award will allow the children the stability of the home, which they have known from birth, will allow them to continue in the same school and will allow them to have daily contact with their mother there. This arrangement will provide Mrs. Thomas with sufficient recreational time, as well as work time/discipline time with the children.

83. This Court adopts the "minimum schedule for visitation"

found at Utah Code Annotated ("U.C.A") §30-3-35(2), modified as follows: Plaintiff shall enjoy visitation on alternating weeks commencing Thursday evening following the release of the children from school and concluding the following Monday morning when the Plaintiff returns the children to school, which shall constitute her alternating weekend visitation. Additionally, the parties have agreed that the Plaintiff shall enjoy midweek visits with the children on Thursday evenings following the children's dismissal from school until the following Friday morning when the Plaintiff delivers the children to school.

84. The parties shall divide the children's "vacation time" between them. Vacation time shall include "off-track" school time when the children are in year-round schools. This will include summer off-track or vacation time provided that each party will enjoy a two (2) week period of time that is undisturbed by visitation with the other parent, which will allow for family vacation time.

85. This modification is made according to the "advisory guidelines" of U.C.A. §30-3-33, particularly paragraph (2) ("the visitation schedule shall be utilized to maximize the continuity and stability of the child's life"). Pursuant to U.C.A. §30-3-34(1),[1] the Court finds that this modification serves three important interests of the children.

First, it economized on the amount of required travel. This

[1] "If the parties are unable to agree on a visitation schedule, the court may establish a visitation schedule consistent with the best interests of the child." U.C.A. §30-3-34(1).

should promote the safety of the children, increase the amount of time available for meaningful activities with each parent, and reduce the amount of money diverted to transportation costs.

Second, it avoids late-evening exchanges on week nights, which could have ill effects upon the health of the children as well as their performance in school.

Third, it reduces the number of times the children are forced to make a change of dwelling, with all of the inconvenience that may entail (in terms of packing and cleaning, for example).

86. For these reasons, the Court finds that this visitation schedule will tend to "maximize the continuity and stability of the child[ren]'s [lives]," U.C.A. §30-3-33(2), and therefore is "consistent with the best interest of the child[ren]" U.C.A. §30-3-34(1). Moreover, this arrangement is compatible with this Court's prior order of "generous, liberal and frequent visitation by [Plaintiff]," Ruling at 18, subject to the restriction to be discussed presently.

87. Moreover, in its ruling from the bench, this Court places an important restriction upon Plaintiff with regard to her periods of visitation. This Court stated that during the visitation periods set forth, "there should be no romantic interaction between the Plaintiff and Pedro Sauer." Minute Entry - Order to Show Cause Hearing ("Minute Entry") at n.p. Plaintiff must use caution and sound judgment in her relations with Mr. Sauer in the presence of the children.

88. Furthermore, there shall be *no romantic interaction whatsoever* between Plaintiff and Mr. Pedro Sauer during the children's martial arts instruction.

89. However, despite the concerns expressed by the Defendant, this Court declines to restrict the children's participation in martial arts while visitation. As the Court has previously stated on the record:

> The participation of the children in martial arts is a separate issue and should be addressed through mediation. If the children are being injured, bruised or engaging in activities which are foreign to the personal philosoph[y] of [either] parent, then the issue can be revisited.

Minute Entry at n.p.

90. In addition, as to any extra-curricular activities, including Ju Jitsu/martial arts, the parties shall consult with one another with the intent to reach a resolution. If they are unable to do so, they shall mediate their differences. The parties shall cooperate with each other in providing medical, school and other records relating to the children.

91. Each party is to assume its own costs and attorney's fees associated with bringing and responding to the Order to Show Cause.

IV.

CHILD SUPPORT

92. Mr. Thomas is entitled to child support for the care and custody of Katie and Joseph. Practically speaking, it is difficult to assess the income of Mr. Thomas because of his self-

employment status and the legal measures set up for financing his business. In addition, income generated from a construction business is volatile from year to year and is sensitive to the economy. Likewise, it is also difficult to assess Mrs. Thomas's income because she historically enjoyed the benefit of an inheritance of stocks and bonds exclusive to her. There is testimony that that source has been exhausted, but nonetheless she had substantial income from the sale or stocks and bonds during the tax year prior to trial.

93. The Court finds Bert Thomas was self-employed, and had numerous tools and two trucks at the time he married Mrs. Thomas. He earns a living using his tools.

94. The Court finds that Mr. Thomas owns a business known as Bert Thomas Construction, Inc. (BTCI). Mr. Thomas performs the following tasks with respect to the business: he performs all of the bidding, purchases all of the materials, answers the telephone or otherwise handles all inquiries, pays all bills, deals with all employees, and has so been involved for approximately 20 years at Sundance. He has periodically worked with Dwight Hooker as an employee.

95. Mr. Thomas has set up, pursuant to the advice of his accountant, an investment company called Thomas Investments. This accounting arrangement allows him to earn passive income through the investment company without Social Security contribution.

96. The Court finds Mr. Thomas has confined virtually all

of his work to the Sundance area. He remodels and maintains homes in this area. He has also built a few homes in the Sundance area.

97. The Court finds Mr. Thomas's income is derived from two sources: (1) Bert Thomas Construction Company, a corporation; and (2) Thomas Investments. There is not anything irregular or inappropriate with respect to his income from either the construction company and investment company as verified by both Ann's and Bert's accountants.

98. The Court finds Mr. Thomas has income which comes from the investment company. The Court finds the arrangement has been set up so that Mr. and Mrs. Thomas could receive passive income, thus reducing their withholding to Social Security. According to Mrs. Thomas' expert there does not appear to be any inappropriate expenditures, or any unaccounted for funds, or inappropriate accounting conducted by Mr. Thomas. Moreover, there does not appear to be any significant benefits to Mr. Thomas from either the construction company or the investment company. While employees of the construction company did minor work on the home, part of the home is listed as an asset of the investment company and is used as an office, shop, bathroom and storage area.

99. Mr. Thomas has been a reasonably successful contractor earning, typically during the years, just prior to separation, approximately $70,000 per year.

100. The Court relies upon the exhibits introduced in connection with the testimony of Derk Rasmussen, CPA, consisting

of Exhibits 7 through 19.

101. Mr. Rasmussen conducted an in depth review of the parties' savings account and checking account activity in order to determine the availability of cash to the family, the expenditures of cash, the income of the Defendant and the projected income of the Defendant.

102. The Defendant has testified that his income and business activity has been about normal during the pendency of the case.

103. The trend in Utah County residential construction has been an increasing trend, and the Bert Thomas Construction revenue trend has approximately kept pace with that increase, see Exhibit 12.

104. Inexplicably and contrary to the Defendant's own testimony, the actual Bert Thomas Construction Company revenue has declined sharply since separation regardless of the trend of residential construction in Utah County and the previous Bert Thomas Construction trend, see Exhibit 13.

105. It would be appropriate to average the income of Mr. Thomas to determine what his actual income earning capacity is. However, it would be inappropriate to give the same weight to post-separation years as to pre-separation years.

106. Therefore, the Court adopts the average set forth in Exhibit 16 for Mr. Thomas's income at $69,567 per year, gross and before taxes, which is an average of the income from the years 1988 to 1992.

107. The Plaintiff's income from her sole employment is $25,824 gross per year.

108. Child support should be based upon the Child Support Guidelines for the State of Utah attributing $5,797 per month as gross income to the Defendant and $2,152 per month to the Plaintiff.

109. To arrive at the amount of child support required of parents collectively, this Court must first determine the "adjusted gross income" of each parent. U.C.A. §78-45-7.4. "Adjusted gross income" in this case simply means gross income. See U.C.A. §78-45-7.6. This Court previously found Defendant's annual income to be $69,567 and Plaintiff's to be $25,824. These figures are hereby found to represent the "gross income" and hence the "adjusted gross income" of each party for purposes of determining their respective child support obligations.

110. According to U.C.A. §78-45-7.4(2)(a), the next step is for this Court to "[c]ombine the adjusted gross incomes of the parents." This yields a sum of $95,391 annually. Next, the Court must "recalculate[]. . . to determine the average [adjusted] gross *monthly* income" of each of the parties separately and of both together." U.C.A. §78-45-7.5(5)(a), emphasis added. The result is a finding that the Defendant receives $5,797.25 per month, while Plaintiff receives $2,152 per month. Together, their monthly income amounts to $7,949.25.

111. With this last figure in hand, the Court is in a position to "determine the base combined child support obligation

using the base combined child support obligation table" found at U.C.A. §78-45-7.14. U.C.A. §78-45-7.7(2)(a). According to that table, where the monthly combined adjusted gross income ("monthly combined income") is between $7,901 and $8,000, and there are two children of the marriage, the base combined child support obligation is $1,236 per month.

112. This amount ($1,236) must be apportioned between the parties according to their respective contributions to the monthly combined income. As it happens, Defendant contributes 72.9% of the income while Plaintiff contributes 27.1% of it. Therefore, Defendant is liable for $901.39 ($1,236 x 72.9%) per month in child support, while Plaintiff is liable for $334.61 ($1,236 x 27.1%) per month.

113. Because Defendant is the custodial parent, he is entitled to receive $334.61 per month from Plaintiff for the purpose of child support.

114. Based upon the foregoing, child support should enter consistent with the guidelines in the amount of $334.61 per month. Total child care paid by Mr. Thomas from February 1994, through March, 1996 was $2,080. His actual responsibility for payment of child care was $438. He is therefore entitled to a credit of $1,642.00

V.

ALIMONY

115. Alimony is largely a function of the income of the parties. U.C.A. §30-3-5(7)(a)(i)(iii). Defendant contends that

this Court erred in determining his income. His contention may or may not be correct. In any event, it is best left for the appellate courts to revisit the complex financial arrangements of the parties. Accordingly, this Court declines the invitation to disturb its prior determination of the Defendant's income.

B.

116. There are a considerable number of factors in determining the necessity, amount and duration of alimony obligations. At a minimum, the Court must consider the factors listed at *id*. These include:

> (i) the financial condition and needs of the recipient spouse;
>
> (ii) the recipient's earning capacity or ability to produce income;
>
> (iii) the ability of the payor spouse to provide support; and ,
>
> (iv) the length of the marriage.

Id. In addition, "[t]he court may consider the fault of the parties. . ." U.C.A. §30-3-5(7)(b).

117. The aim of alimony generally is to maintain, as much as possible, a certain standard of living for each of the parties to a divorce. Thus,

> [a]s a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony . . . However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time

of trial. . . U.C.A §30-3-5(&)(c).

Additionally, "[t]he court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living." U.C.A. §30-3-5(7)(d).

118. These are the statutory statements which guide the analysis which follows.

C.

119. Defendant in this case seeks a retroactive award of temporary support. He was ordered to make payments of $700 per month at a preliminary order at the earliest stages of these proceedings. Defendant argues that amount was established based upon a faulty and inflated determination of his income. He argues further that an initial faulty determination has been perpetrated through this entire case to the harsh detriment of the Defendant.

120. Next, Defendant argues that Plaintiff's personal expenses have been highly exaggerated, that she has sufficient income to meet her needs and that she will receive a significant amount of the proceeds (approximately $78,000) from the equity in the home. Further, he argues that during the pendency of this action, she has had access to large amounts of money derived from the sale of stocks and bonds and from personal savings (sometimes in excess of $120,000). Next, he argues that yearly gifts of stocks and bonds, in light of the divorce, have now simply been conveyed to their minor children as a subterfuge until after the divorce.

121. Next, he argues that the accounts of the children can be utilized to purchase a home, etc. and reduce any need for alimony. The Court finds this argument to be interesting, but unconvincing. Lastly, Defendant argues that Plaintiff's affidavit of personal expenses is exaggerated, and that she has sufficient income to meet her personal needs.

122. Counsel for Plaintiff argues that Defendant should pay alimony pursuant to the Temporary Order and that Plaintiff should not pay child support simply because she cannot afford it even accounting for the alimony she will receive. Plaintiff argues that her present personal expenses exceed her income.

123. The purpose of alimony is to enable the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage. Noble v. Noble, 761 P.2d 1369, 1372 (Utah 1988).

> The 1995 amendment to §30-3-5(7)(a) codified *Jones* which had established a three factor approach in setting alimony. In setting an award of alimony, a trial court must consider the following three factors: (1) the financial condition and needs of the receiving spouse, (2) the ability of the receiving spouse to produce sufficient income for him or herself, and (3) the ability of the payor spouse to provide support. However, "alimony may not be automatically awarded whenever there is disparity between the parties' incomes"???

124. Additionally, the Court has weighed the following three factors.

1. Earnings and Expenses

This Court has previously determined the income of each

party. The Court finds that Plaintiff's expenses are exaggerated and that the expenses of Defendant will necessarily increase somewhat because of this Court's award of custody to Defendant. In addition, it is apparent that during this litigation that Plaintiff has had access to sums of money derived principally from the sale of gifted stock and bonds.

2. Education, Health, Etc.

Both parties are employed and are healthy. Plaintiff is a college graduate and has pursued an advanced degree. She is employed as a teacher and has steady, stable employment. Defendant is a high school graduate with no college degree and no substantive advanced training. He runs a one-man-managed construction company, employing others as the seasons allow. He has expressed some desire to change careers and seek a more stable, long-term employment with benefits and retirement.

3. Ability to Pay

Defendant argues that he cannot afford alimony because he is now saddled with a refinance of the home in order to pay out the equity to Defendant. Further, he again argues that the Court's determination of income is in error and that Plaintiff's take home income exceeds his.

125. This Court previously held that the character of Defendant's source of income requires that he remain in the Sundance home. His construction business relies exclusively upon word-of-mouth referrals in the Sundance area.

126. Clearly, there are limited funds to meet the demands

of two households. It is impossible to absolutely equalize standards of living. This Court must order alimony in an attempt to provide the minimum of necessities, comforts, or luxuries essential to maintain customary or proper status or circumstances.

127. Defendant has some ability to pay alimony. Accordingly, the Court awards Plaintiff three years (36 months) of alimony at the rate of $700.00 per month. Defendant may have credit for amounts paid pursuant to the Temporary Order of the Court. This award shall automatically terminate upon Plaintiff's remarriage or cohabitation with another person.

VI.

PENSION, RETIREMENT BENEFITS, MISCELLANEOUS, ETC.

128. Health care insurance and health care costs. The children should be maintained on Mrs. Thomas' health care plan. Each party should pay one-half of any unreimbursed routine health care costs. Any non-routine medical, dental or orthodontic care costs must be agreed upon by the parties before any such cost is incurred. The Court finds Mrs. Thomas terminated Mr. Thomas from her health insurance. Although the insurance coverage was reinstated, as a result, Mr. Thomas incurred and paid health care costs in the amount of $1,944, which should have been paid by her insurance. Mr. Thomas is entitled to a credit in that amount against her interest in the home (See Exhibit 53). If Mrs. Thomas is able to obtain a result from the insurance company, she may have it.

129. It is clear that Plaintiff improperly canceled health care benefits, and it was necessary for the Court to order reinstatement. Defendant argues that he is entitled to medical expenses he incurred because of the improper cancellation. Plaintiff argues that Defendant did not comply with insurance company policies. It appears that these problems arose because of Plaintiff's improper cancellation of coverage. She is chargeable, but is also entitled to the insurance reimbursement payments once the bill has been presented and her payment to Defendant has been verified.

130. Cost of custody evaluation. These parties stipulated to Dr. Jensen as a friend of the Court. When Plaintiff found his recommendations to be unfavorable, adverse or objectionable, she moved to have another evaluator appointed. Regardless of the language of this Court's decision, it was the intent of the Court that the parties should share the costs of Dr. Jensen equally. Plaintiff should bear all costs associated with the report and appearance of Dr. Stewart.

131. Tax Deductions. Each party is entitled to claim one of the children as a dependent for tax purposes.

132. Debts. Mr. Thomas shall be responsible for his debts and obligations including those of the corporation. Mrs. Thomas shall be responsible for her own debts and obligations.

133. Costs of litigation. Each party shall be responsible of his or her own costs of litigation, which include attorney's fees, costs, costs of appraisals and expert witnesses.

134. Retirement. Mr. Thomas is entitled to a qualified domestic relations order. The date of the marriage is July 17, 1992. The date of the divorce is August 13, 1996. Mr. Thomas is entitled to be paid his interest in the retirement pursuant to the terms and conditions of the plan. The ratio which he is entitled to receive is as follows:

$$.5 \times \frac{\text{total \# of years married during which Mrs. Thomas was teaching}}{\text{total \# of years Mrs. Thomas will have taught at retirement.}}$$

Mr. Thomas is entitled to be designated as a fifty percent (50%) survivor.

135. The Court finds Mr. Thomas is also entitled to one-half of the school bus credit to which he was entitled by virtue of paying taxes on the home in Sundance. Mrs. Thomas collected this credit in the amount of $400.

136. The parties are ordered to cooperate in the effectuation of these terms and conditions.

BASED UPON the foregoing Findings of Fact, the Court now makes and enters its,

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and adjudicate this matter.

2. The Plaintiff is entitled to a Decree of Divorce, the same to become final upon signing and entry.

3. That the Plaintiff should be awarded the annual gifts of cash and stock Plaintiff has received during the marriage,

except for those funds which have been designated in trust for the children which should be maintained by the Plaintiff in trust for the children and made available to them consistent with the intent of the donor.

4. Each party should be awarded the personal property presently in their possession and, in addition and not withstanding that, that the Plaintiff should be awarded the following items of personal property:

(a) Kachina doll;

(b) Twig outdoor furniture (five (5) pieces) or the Adirondack outdoor furniture (four (4) pieces), at the election of the Defendant;

(c) One (1) of the Bearnaise Mountain Dog puppies, or financial equivalent;

(d) The oriental rug;

(e) The antique toy trucks given to the Plaintiff by her father;

(f) The wooden bowl;

(g) One (1) copy of the home videos.

5. The Defendant should be awarded the home and real property located in Sundance, Utah and the Plaintiff should be awarded an interest in the home in the amount of $78,050. The Defendant should either purchase the Plaintiff's interest in the cabin or sell the cabin and divide the proceeds consistent with the Decree. The Defendant's election to purchase the cabin should be exercised within 120 days from date hereon. Upon

expiration, the cabin should be placed on the market for sale, and the parties should cooperate in its listing, showing, selling and closing.

6. The Defendant should be awarded the sole care, custody and control of the minor children of the parties subject to generous, liberal and frequent visitation rights in the Plaintiff.

7. The Plaintiff is awarded reasonable and liberal visitation rights which consist of those set forth in §30-3-35 Utah Code Ann., amended as follows: Plaintiff shall enjoy visitation on alternating weeks commencing Thursday evening following the release of the children from school and concluding the following Monday morning when the Plaintiff returns the children to school, which shall constitute her alternating weekend visitation. Additionally, the parties agree that the Plaintiff shall enjoy midweek visits with the children on Thursday evenings following the children's dismissal from school until the following Friday morning when the Plaintiff delivers the children to school.

8. The parties shall divide the children's "vacation time" between them. Vacation time shall include "off-track" school time when the children are in year-round schools. This will include summer off-track or vacation time provided that each party will enjoy a two (2) week period of time that is undisturbed by visitation with the other parent, which will allow for family vacation time.

9. The Court adopts the advisory guidelines contained in §30-3-33 Utah Code Ann.

10. The Defendant should be awarded child support from the Plaintiff in the amount of $334.96 per month consistent with the Utah Uniform Child Support Guidelines.

11. The Defendant should be awarded a credit in the amount of $1,642.00 for overpayment of child care.

12. The Plaintiff is awarded alimony from the Defendant in the amount of $700.00 per month for a period of three (3) years commencing with the entry of the Temporary Order herein. Alimony shall automatically terminate upon the Plaintiff's remarriage or cohabitation with another person.

13. The children should be maintained on Plaintiff's health care plan. Each party should pay one-half of any unreimbursed routine health care costs. Any non-routine medical, dental or orthodontic care costs must be agreed upon by the parties before any such cost is incurred.

14. Defendant should be entitled to a credit in the amount of $1,944 against Plaintiff's interest in the home for medical expenses incurred by the Defendant which would have been covered on Plaintiff's medical insurance had Plaintiff not canceled Defendant's coverage. If Plaintiff is able to obtain a result from the insurance company, she should have that.

15. The parties should share equally in the costs of the Dr. Jay Jensen child custody evaluation.

16. Each party should be entitled to claim one of the

children as a dependent for tax purposes.

17. The Defendant should pay and assume his own debts and obligations, including those of the corporation, and hold the Plaintiff harmless thereon. Plaintiff should pay and assume her debt and obligations and hold the Defendant harmless thereon.

18. Each party should pay their own costs of litigation, which include attorney's fees, costs, costs of appraisals and expert witnesses.

19. The Defendant should be entitled to a qualified domestic relations order. The date of the marriage is July 17, 1992. The date of the divorce is August 13, 1996. Defendant should be paid his interest in the retirement pursuant to the terms and conditions of the plan. The ratio which Defendant should be entitled to receive is as follows:

$$.5 \times \frac{\text{total \# of years married during which Mrs. Thomas was teaching}}{\text{total \# of years Mrs. Thomas will have taught at retirement.}}$$

Defendant should be designated as a fifty percent (50%) survivor.

20. The Defendant is awarded one-half (½) of the school bus credit in the amount of $400.00 which Plaintiff previously collected.

21. The parties should cooperate in the effectuation of these terms and conditions.

DATED THIS 7 day of ~~May,~~ July 1997

BY THE COURT:

ORIGINAL FILED IN RECORDS OF THE STATE OF UTAH FOURTH DIST COURT · UTAH COUNTY ·

JOHN W. DAVIS
DISTRICT COURT JUDGE

Approved as to Form:

BRENT YOUNG
Attorney for Defendant

Approved as to Form:

FREDERICK N. GREEN
Attorney for Plaintiff

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IN THE JUDICIAL DISTRICT
OF UTAH COUNTY, STATE OF UTAH

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ENTERED 7/10/97

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

ANN ELIZABETH THOMAS,

Plaintiff,

vs.

BERT CHARLES THOMAS,

Defendant.

DECREE OF DIVORCE

Civil No. 934402503

Judge Lynn W. Davis
Comm. Howard Maetani

The above-entitled matter came on regularly for trial commencing December 5, 1995, and following an adjournment convening again February 26, 1996. The Honorable Judge Lynn Davis presided. The Plaintiff and the Defendant were present in person and represented by their attorneys, Frederick N. Green appearing for the Plaintiff and Brent Young appearing for the Defendant. Each party presented evidence and testimony, and the Court entertained the testimony of the parties and witnesses. Counsel argued the following contested issues: 1) division of personal property; 2) division of real property and value of real property and marital versus premarital property; 3) child custody and visitation; 4) child support; 5) alimony; 6) pension, retirement issues, business assets; and 7) miscellaneous issues. Final argument was heard by the Court on April 1, 1996 and a

final hearing was held on November 8, 1996 to resolve remaining issues. The Court, having reviewed the file, the exhibits, and the arguments of counsel based thereon the Court having made and entered herein its Findings of Fact and Conclusions of Law, and good cause otherwise appearing, it is, hereby

ORDERED, ADJUDGED AND DECREED, as follows:

1. That the Plaintiff is awarded a Decree of Divorce from the Defendant, the same to become final upon the signing and entry hereof.

2. That the Plaintiff is awarded the annual gifts of cash and stock Plaintiff has received during the marriage, except for those funds which have been designated in trust for the children which shall be maintained by the Plaintiff in trust for the children and made available to them consistent with the intent of the donor.

3. That each party is awarded the personal property presently in their possession and, in addition and not withstanding that, that the Plaintiff is awarded the following items of personal property:

(a) Kachina doll;

(b) Twig outdoor furniture (five (5) pieces) or the Adirondack outdoor furniture (four (4) pieces), at the election of the Defendant;

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(d) The oriental rug;

(e) The antique toy trucks given to the Plaintiff by her father;

(f) The wooden bowl;

(g) One (1) copy of the home videos.

4. That the Defendant is awarded the home and real property located in Sundance, Utah and the Plaintiff is awarded an interest in the home in the amount of $78,050. The Defendant shall either purchase the Plaintiff's interest in the cabin or sell the cabin and divide the proceeds consistent with this Decree. The Defendant's election to purchase the cabin shall be exercised within 120 days from date hereon. Upon expiration, the cabin shall be placed on the market for sale, and the parties shall cooperate in its listing, showing, selling and closing.

5. That the Defendant is awarded the sole care, custody and control of the minor children of the parties subject to generous, liberal and frequent visitation rights in the Plaintiff.

6. That the Plaintiff is awarded reasonable and liberal visitation rights which consist of those set forth in §30-3-35 Utah Code Ann., amended as follows: Plaintiff shall enjoy visitation on alternating weeks commencing Thursday evening following the release of the children from school and concluding the following Monday morning when the Plaintiff returns the children to school, which shall constitute her alternating weekend visitation. Additionally, the parties agree that the Plaintiff shall enjoy midweek visits with the children on

Thursday evenings following the children's dismissal from school until the following Friday morning when the Plaintiff delivers the children to school.

7. That the parties shall divide the children's "vacation time" between them. Vacation time shall include "off-track" school time when the children are in year-round schools. This will include summer off-track or vacation time provided that each party will enjoy a two (2) week period of time that is undisturbed by visitation with the other parent, which will allow for family vacation time.

8. That the Court adopts the advisory guidelines contained in §30-3-33, Utah Code Ann.

9. That the Defendant is awarded child support from the Plaintiff in the amount of $334.96 per month consistent with the Utah Uniform Child Support Guidelines.

10. That the Defendant is awarded a credit in the amount of $1,642.00 for overpayment of child care.

11. That the Plaintiff is awarded alimony from the Defendant in the amount of $700.00 per month for a period of three (3) years commencing with the entry of the Temporary Order herein. Alimony shall automatically terminate upon the Plaintiff's remarriage or cohabitation with another person.

12. That the children shall be maintained on Plaintiff's health care plan. Each party shall pay one-half (½) of any unreimbursed routine health care costs. Any non-routine medical, dental or orthodontic care costs must be agreed upon by the

parties before any such cost is incurred.

13. That Defendant shall receive a credit in the amount of $1,944 against Plaintiff's interest in the home for medical expenses incurred by the Defendant which would have been covered on Plaintiff's medical insurance had Plaintiff not canceled Defendant's coverage. If Plaintiff is able to obtain a result from the insurance company, she shall have that.

14. That the parties shall share equally in the costs of the Dr. Jay Jensen child custody evaluation.

15. That each party is entitled to claim one of the children as a dependent for tax purposes.

16. That the Defendant shall pay and assume his own debts and obligations, including those of the corporation, and hold the Plaintiff harmless thereon. Plaintiff shall pay and assume her debt and obligations and hold the Defendant harmless thereon.

17. That each party shall pay their own costs of litigation, which include attorney's fees, costs, costs of appraisals and expert witnesses.

18. That the Defendant is entitled to a qualified domestic relations order. The date of the marriage is July 17, 1992. The date of the divorce is August 13, 1996. Defendant shall be paid his interest in the retirement pursuant to the terms and conditions of the plan. The ratio which Defendant shall be entitled to receive is as follows:

.5 x <u>total # of years married during which Mrs. Thomas was teaching</u>

total # of years Mrs. Thomas will have taught at retirement.

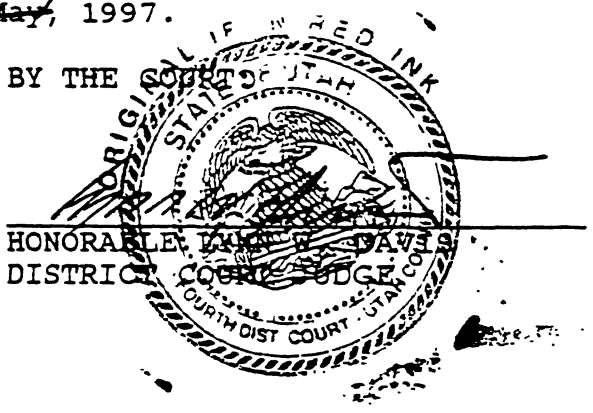
Defendant shall be designated as a fifty percent (50%) survivor.

19. That the Defendant is awarded one-half (½) of the school bus credit in the amount of $400.00 which Plaintiff previously collected.

20. That the parties shall cooperate in the effectuation of these terms and conditions.

DATED THIS 8 day of ~~May~~ July, 1997.

BY THE COURT:



HONORABLE [illegible] DAVIS
DISTRICT COURT JUDGE

Approved as to Form:

6-18-97
BRENT YOUNG
Attorney for Defendant

Approved as to Form:

FREDERICK N. GREEN
Attorney for Plaintiff

C:\WPDOCS\FNG\T-187-97\DECREE.3

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ANN ELIZABETH THOMAS, Plaintiff, vs. BERT CHARLES THOMAS, Defendant.	**RULING ON ALL OUTSTANDING MOTIONS AND ORDER TO SHOW CAUSE** CASE NO. 934402503 DATE: JANUARY 14, 1997 JUDGE: LYNN W. DAVIS CLERK: SGJ

On August 19, 1996, following trial on a number of contested issues, this Court entered a ruling ("Ruling"). The Ruling disposed of many, but not all, of the issues then pending in this case. Some issues were reserved by the Court.

Thus Plaintiff Ann Elizabeth Thomas ("Plaintiff") subsequently filed a Motion for Ruling on "issues which have not been addressed in the Court's Ruling and are pivotal to issues which have been reserved by the Court." Motion for Ruling at 1. The Motion was dated August 29, 1996 but was filed in this Court on September 3, 1996.

Plaintiff next filed a Notice to Submit for Decision ("Notice") on September 26, 1996. This Notice simply informed the Court and the Defendant that the only motion then "at issue and ready for decision of the court [*sic*]" was the Motion for Ruling.

Shortly thereafter, on October 4, 1996, Defendant Bert Charles Thomas ("Defendant") filed a Motion for Extension of Time to Reply to Mrs. Thomas' [*sic*] Motion for Ruling and Motion to Alter or Amend the Findings, referring to Plaintiff's Motion for Ruling. This motion, which asked that Defendant be given until October 9, 1996 to reply, was granted.

On October 10, 1996, Defendant filed his Reply to Plaintiff's Motion for Ruling and Motion to Alter or Amend the Findings. The following day, October 11, 1996, Defendant filed a Motion for Order to Show Cause. This Motion was accompanied by the Affidavit of Defendant, Bert Thomas[,] in Support o[f] Order to Show Cause to Implement Visitation.

This Court granted Defendant's motion and issued an Order to Show Cause ("OSC") on October 17, 1996.

On November 4, 1996, Plaintiff's Reply Memorandum in Support of "Motion for Ruling" [*sic*] was filed. Four days later, on November 8, 1996, a hearing on the OSC and other motions was held. Present at the hearing were both of the parties as well as their respective counsel: Frederick N. Green for Plaintiff and Brent D. Young for Defendant.

This Court, having carefully reviewed the file, with particular attention to the recent memoranda of counsel and transcript of the hearing, now enters the following:

I.

VISITATION
ORDER TO SHOW CAUSE

At the November 8 hearing on the OSC, this Court ruled from the bench as to the matter of visitation. For purposes of clarification, the visitation order is set forth as follows.

This Court adopts the "minimum schedule for visitation" found at Utah Code Annotated ("U.C.A.") § 30-3-35(2), modified as follows. Plaintiff, as noncustodial parent, shall have visitation rights on alternating weeks, beginning on Thursday evening at 5:30 p.m. and concluding on ~~Sunday evening at 7:00~~ p.m. This shall constitute her regular weekday and weekend visitation.

This modification is made according to the "advisory guidelines" of U.C.A. § 30-3-33, particularly paragraph (2) ("the visitation schedule shall be utilized to maximize the continuity and stability of the child's life"). Pursuant to U.C.A. § 30-3-34(1),[1] the Court finds that this modification serves three important interests of the children.

---

[1] "If the parties are unable to agree on a visitation schedule, the court may establish a visitation schedule consistent with the best interests of the child." U.C.A. § 30-3-34(1).

First, it economizes on the amount of required travel. This should promote the safety of the children, increase the amount of time available for meaningful activities with each parent, and reduce the amount of money diverted to transportation costs.

Second, it avoids late-evening exchanges on week nights, which could have ill effects upon the health of the children as well as their performance in school. Third, it reduces the number of times the children are forced to make a change of dwelling, with all of the inconvenience that may entail (in terms of packing and cleaning, for example).

For these reasons, the Court finds that this visitation schedule will tend to "maximize the continuity and stability of the child[ren]'s [lives]," U.C.A. § 30-3-33(2), and therefore is "consistent with the best interests of the child[ren]" U.C.A. 30-3-34(1). Moreover, this arrangement is compatible with this Court's prior order of "generous, liberal and frequent visitation by [Plaintiff]," Ruling at 18, subject to the restriction to be discussed presently.

Moreover, in its ruling from the bench, this Court placed an important restriction upon Plaintiff with regard to her periods of visitation. This Court stated that during the visitation periods set forth, "there should be no romantic interaction between the Plaintiff and Pedro Sauer." Minute Entry - Order to Show Cause Hearing ("Minute Entry") at n.p. Plaintiff must use caution and sound judgment in her relations with Mr. Sauer in the presence of the children.

Furthermore, there shall be *no romantic interaction whatsoever* between Plaintiff and Mr. Pedro Sauer during the children's martial arts instruction.

However, despite the concerns expressed by the Defendant, this Court declines to restrict the children's participation in martial arts while on visitation. As the Court has previously stated on the record:

> The participation of the children in martial arts is a separate issue and should be addressed through mediation. If the children are being injured, bruised or engaging in activities which are foreign to the personal philosoph[y] of [either] parent, then the issue can be revisited.
>
> Minute Entry at n.p.

In addition, as to any extra-curricular activities, including jujitsu/martial arts, the parties shall consult with one another with the intent to reach a resolution. If they are unable to do so, they shall mediate their differences. The parties shall cooperate with each other in providing medical, school and other records relating to their children.

Each party is to assume its own costs and attorneys' fees associated with bringing and responding to the Order to Show Cause.

Any additional issues concerning visitation are reserved until further notice.

II.

PERSONAL PROPERTY

Plaintiff requests that the Court place a monetary value on Defendant's tools and then factor that value into the equitable division of the personal property. This Court carefully considered the agreement/stipulation of the parties, rejected it in part, and fashioned an equitable division of the personalty under the circumstances. Weighing all factors, the Court believes it to be equitable and fair.

In this regard, the Court makes a few observations. First, this Court finds that Plaintiff has minimized the value of some of her items and exaggerated the value of some of Defendant's items. Some tools were purchased prior to the marriage and some after. Those acquired during the marriage are generally worn out or in disrepair. This Court awarded Mr. Thomas those tools, calculating the values of the assets of both parties to be nearly equal, fair and equitable.

Absolute mathematical precision is impossible. For example, some items given to the Plaintiff, such as the Oriental rug, maintain value over time much better than tools which become worn out by day-to-day use in the construction industry.

These are the statutory statements which guide the analysis which follows.

C.

Defendant in this case seeks a retroactive award of overpayment of temporary support. He was ordered to make payments of $700 per month at a preliminary order at the earliest stages of these proceedings. Defendant argues that that amount was established based upon a faulty and inflated determination of his income. He argues further that an initial faulty determination has been perpetrated throughout this entire case to the harsh detriment of Defendant.

Next, Defendant argues that Plaintiff's personal expenses have been highly exaggerated, that she has sufficient income to meet her needs and that she will receive a significant amount of the proceeds (approximately $78,000). Further, he argues that during the pendency of this action, she has had access to large amounts of money derived from the sale of stocks and bonds and from personal savings (something in excess of $120,000). Next, he argues that yearly gifts of stocks and bonds, in light of the divorce, have now simply been conveyed to their minor children as a subterfuge until after the divorce.

Next, he argues that the accounts of the children can be utilized to purchase a home, etc. and reduce any need for alimony. The Court finds this argument to be interesting, but unconvincing. Lastly, Defendant argues that Plaintiff's affidavit of personal expenses is exaggerated, and that she has sufficient income to meet her personal needs.

Counsel for Plaintiff argues that Defendant should pay alimony pursuant to the temporary order and that Plaintiff should not pay child support simply because she cannot afford it even accounting for the alimony she will receive. Plaintiff argues that her present personal expenses exceed her income.

The purpose of alimony is to enable the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage. *Noble v. Noble*, 761 P.2d 1369, 1372 (Utah 1988).

> The 1995 amendment to § 30-3-5(7)(a) codified *Jones* which had established a three factor approach in setting alimony. In setting an award of alimony, a trial court must consider the following three factors: (1) the financial condition and needs of the receiving spouse, (2) the ability of the receiving spouse to produce sufficient income for him or herself, and (3) the ability of the payor spouse to provide support. However, "alimony may not be automatically awarded whenever there is disparity between the parties' incomes."???

Additionally, the Court has weighed the following three factors.

1. Earnings and Expenses

This Court has previously determined the income of each party. The Court finds that Plaintiff's expenses are exaggerated and that the expenses of Defendant will necessarily increase somewhat because of this Court's award of custody to Defendant. In addition, it is apparent that during this litigation that Plaintiff has had access to sums of money derived principally from the sale of gifted stocks and bonds.

2. Education, Health, Etc.

Both parties are employed and are healthy. Plaintiff is a college graduate and has pursued an advanced degree. She is employed as a teacher and has steady, stable employment. Defendant is a high school graduate with no college degree and no substantive advanced training. He runs a one-man-managed construction company, employing others as the seasons allow. He has expressed some desire to change careers and seek a more stable, long-term employment with benefits and retirement.

3. Ability to Pay

Defendant argues that he cannot afford alimony because he is now saddled with a refinance of the home in order to pay out the equity to Defendant. Further, he again argues

that the Court's determination of income is in error and that Plaintiff's take-home income exceeds his.

This Court previously held that the character of Defendant's source of income requires that he remain in the Sundance home. His construction business relies exclusively upon word-of-mouth referrals in the Sundance area.

Clearly there are limited funds to meet the demands of two households. It is impossible to absolutely equalize standards of living. This Court must order alimony in an attempt to provide the minimum of necessities, comforts, or luxuries essential to maintain customary or proper status or circumstance.

This Court concludes that even with the refinance, Defendant has some ability to pay alimony. Accordingly, the Court awards Plaintiff four years (36 months) of alimony at the rate of $700 per month. Defendant may have credit for amounts paid pursuant to the temporary order of the Court. This award shall automatically terminate upon Plaintiff's remarriage or cohabitation with another person.

IV.

CHILD SUPPORT

To arrive at the amount of child support required of parents collectively, this Court must first determine the "adjusted gross income" of each parent. U.C.A. § 78-45-7.4. "Adjusted gross income" in this case simply means gross income. *See* U.C.A. § 78-45-7.6. This Court previously found Defendant's annual income to be $69,567 and Plaintiff's to be $25,824. These figures are hereby found to represent the "gross income" and hence the "adjusted gross income" of each party for purposes of determining their respective child support obligations.

According to U.C.A. § 78-45-7.7(2)(a), the next step is for this Court to "[c]ombine the adjusted gross incomes of the parents." This yields a sum of $95,391 annually. Next, the Court must "recalculate[] . . . to determine the average [adjusted] gross *monthly* income" of

each of the parties separately and of both together. U.C.A. § 78-45-7.5(5)(a), emphasis added. The result is a finding that the Defendant receives $5,797.25 per month, while Plaintiff receives $2,152.00 per month. Together, their monthly income amounts to $7,949.25.

With this last figure in hand, the Court is in a position to "determine the base combined child support obligation using the base combined child support obligation table" found at U.C.A. § 78-45-7.14. U.C.A. § 78-45-7.7(2)(a). According to that table, where the monthly combined adjusted gross income ("monthly combined income") is between $7,901 and $8,000, and there are two children of the marriage, the base combined child support obligation is $1,236 per month.

This amount ($1,236) must be apportioned between the parents according to their respective contributions to the monthly combined income. As it happens, Defendant contributes 72.9% of the income while Plaintiff contributes 27.1% of it. Therefore, Defendant is liable for $901.39 ($1,236 x 72.9%) per month in child support, while Plaintiff is liable for $334.61 ($1,236 x 27.1%) per month.

Because Defendant is the custodial parent, he is entitled to receive $334.61 per month from Plaintiff for the purpose of child support.

V.

DISSIPATION OF ASSETS

Plaintiff claims that at the time of the separation, Defendant had approximately $40,000 on account in the Bert Thomas, Inc.'s Savings Account and that she is entitled to one-half as a marital asset. Plaintiff further argues that the account was depleted to approximately $7,000 at the time of the trial and that the Defendant was the sole beneficiary—i.e., he used the funds to live on and meet his obligations under the temporary order.

Defendant argues that the subject account was an operating fund for the company and the amount in the account fluctuated significantly from month-to-month; the amount of money in an operating business account at any particular time has no particular significance.

These parties set up a complex financial system to operate the Bert Thomas Construction Inc. business. The best this Court can glean, the flow of money in and out of the company is represented in the flow chart attached (Exhibit No. 37).

Defendant is accurate that the amount in a corporate savings account on a given date is not controlling. To determine the value of the marital asset, one must determine the value of the company. There was insufficient presented evidence at trial to arrive at the value of Bert Thomas construction Inc. and therefore there was an insufficient basis to award Plaintiff assets or assess financial obligations. This Court did not make a finding of value of Bert Thomas Construction Inc. and cannot make such a determination by looking solely at a savings account as of a given date.

VI.

MEDICAL COSTS AND COSTS OF PSYCHOLOGICAL REPORTS

A. Medical Costs

It is clear that Plaintiff improperly cancelled health care benefits, and it was necessary for the Court to order reinstatement. Defendant argues that he is entitled to medical expenses he incurred because of the improper cancellation. Plaintiff argues that Defendant did not comply with insurance company policies. It appears that these problems arose because of Plaintiff's improper cancellation of coverage. She is chargeable, but is also entitled to the insurance reimbursement payments once the bill has been presented and her payment to Defendant has been verified.

B. Psychological Reports

These parties stipulated to the use of Dr. Jensen as a friend of the Court. When Plaintiff found his recommendations to be unfavorable, adverse or objectionable, she moved to have another evaluator appointed. Regardless of the language of this Court's decision, it was the intent of the Court that the parties should share the costs of Dr. Jensen equally. Plaintiff should bear all costs associated with the report and appearance of Dr. Stewart.

VII.

FINDINGS PREPARATION

Two drafts of proposed findings were submitted to this Court after the initial decision. The draft proposed by Mr. Green more closely tracks this Court's decision.

RULING

Plaintiff's Motion to Alter or Amend the Findings is granted in part and denied in part consistent with the discussion above. Counsel for Plaintiff is instructed to supplement previously submitted pleadings to include the provisions of this decision and to submit the same to Mr. Young for approval as to form.

Defendant's Order to Show Cause is resolved pursuant to this ruling. Counsel for Defendant is instructed to prepare an Order consistent with this Court's decision and submit the same for approval as to form to Mr. Green.

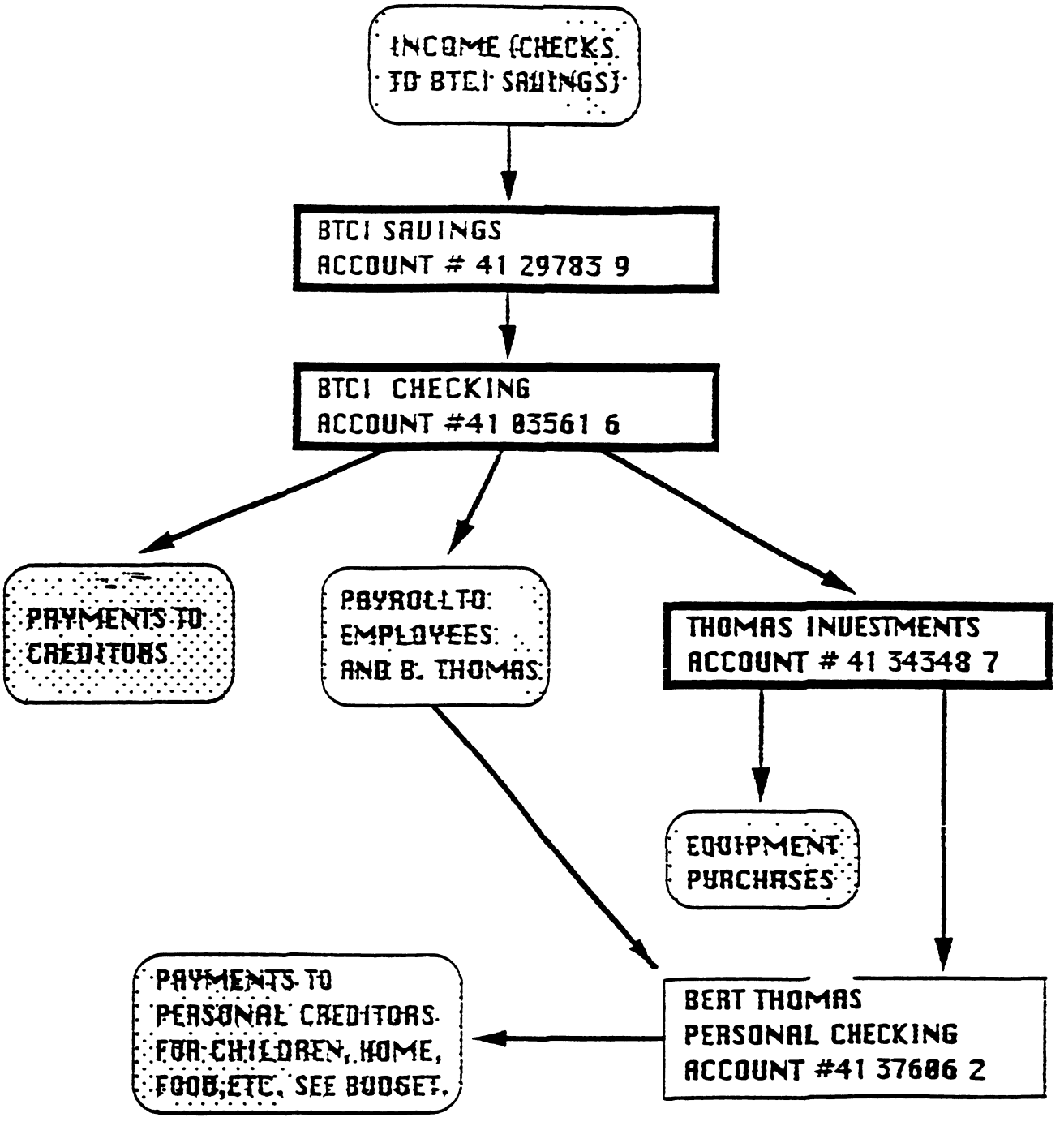
Dated this 13 day of January, 1997.

BY THE COURT

LYNN W. DAVIS, JUDGE

cc: Brent D. Young, Esq.
Frederick N. Green, Esq.

BTCI Cash Flow Diagram



8-19-96

FILED 8-19-96
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ANN ELIZABETH THOMAS, Plaintiff, vs. BERT CHARLES THOMAS, Defendant.	RULING CASE NO. 934402503 DATE: AUGUST 19, 1996 JUDGE: LYNN W. DAVIS CLERK: SGJ

The above-entitled matter came on regularly for trial commencing September 5, 1995, and, following an adjournment, convening again February 26, 1996. The Honorable Judge Lynn Davis presided. The plaintiff and the defendant were present in person and represented by their attorneys, Frederick N. Green appearing for the plaintiff and Brent Young appearing for the defendant. Each party presented evidence and testimony, and the Court entertained the testimony of the parties and witnesses. Counsel argued the following contested issues: 1) division of personal property; 2) division of real property and value of real property and marital versus premarital property; 3) child custody and visitation; 4) child support; 5) alimony; 6) pension, retirement issues, business assets; and 7) miscellaneous issues. Final argument was heard by the Court on April 1, 1996. The Court, having reviewed the file, the exhibits, and the arguments of counsel based thereon and good cause otherwise appearing, the Court now makes and enters its

FINDINGS OF FACTS

1. The parties were married on July 17, 1982.

2. Each of the parties resided in Utah County for more than three (3) months prior to the filing of the Complaint.

3. The parties have two (2) minor children of the marriage: Joseph, born July 12, 1986, age ten (10); and Katherine, "Katie," born July 8, 1989, age seven (7).

4. The parties separated and began to live separate and apart on March 21, 1993.

5. The plaintiff is thirty-eight (38) years old and has earned a Bachelor of Science degree, prior to her marriage to the defendant, from the University of Utah.

6. The plaintiff presently teaches special education for the Alpine School District.

7. The parties' children also go to school in the Alpine School District at the same school in which the plaintiff teaches.

8. The defendant is a self-employed contractor and builder licensed as such in the State of Utah. He is a high school graduate with some plans to continue his education.

9. During the marriage, the parties have acquired personal property and improved real property.

I.

PERSONAL PROPERTY

10. The general purpose of property division is to allocate property "in a manner which best serves the needs of the parties and best permits them to pursue their separate lives." The overriding consideration in property division is "that the ultimate division be equitable--that property be fairly divided between the parties given their contributions during the marriage and their circumstances at the time of the divorce." Burt v. Burt, 799 P.2d 1166, 1171.

11. For the purposes of asset consideration this Court accepts the following definition:

> Marital property is all property acquired during marriage except property acquired by gift or inheritance and it "encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived." Dunn v. Dunn, 802 P.2d 1314, 1317-1318.

12. It is clear that statutory law confers broad discretion upon the trial court in the division of property, real and personal, regardless of its source or time of acquisition.

13. During the course of the marriage, and prior thereto, the plaintiff received annual gifts, principally from her grandfather.

14. These gifts were always in cash or in kind and, when in the form of stock, were conveyed to the plaintiff individually and not to the defendant as well.

15. This practice continued through the marriage and existed among Mrs. Thomas' siblings, likewise.

16. Since the separation of the parties, gifts have been made in trust for the benefit of the parties' minor children.

17. All of these gifts have always been maintained in separate accounts or in separate stock accounts or certificates, and have not been augmented, supplemented, added to, protected or enhanced by the defendant or from earnings from either party during the marriage.

18. As such, they are classic cases of separate property which have maintained their separate identity and should be awarded to the plaintiff, except for those funds which have been designated in trust for the children which should be maintained by the plaintiff, in trust, for the children and made available to them consistent with the intent of the donor.

19. Subsequent to separation, the defendant prepared a document entitled "Personal Property Settlement Between Ann Thomas and Bert Thomas" dated February 5, 1994.

The Court finds the parties discussed the final resolution of the division of personal property and tools. Mr. Thomas drafted an agreement. Mrs. Thomas made changes to that agreement and signed it. Property was delivered and accepted pursuant to the agreement. No discussion was had about that agreement for a period of approximately one year. Based upon the authority of the agreement, Mrs. Thomas even sold a vehicle.

20. Upon review, and based upon the testimony of the parties, the Court finds that the "Settlement" is ambiguous because it does not state whether it is a settlement of all property rights or only temporary property rights.

21. Furthermore, the agreement was executed without the benefit of counsel, and its enforcement would result in a potentially significant and substantial inequity between the parties. Additionally, the circumstances surrounding the agreement and its consideration are heavily disputed.

21. Rather, the Court relies upon Exhibit 25 of the plaintiff which lists, in detail, the personal property in each party's possession, what property would constitute gifts to either party, and the relative values of the property.

22. Therefore, it would be reasonable for the parties to be awarded the personal property presently in their possession and, in addition and not withstanding that, that the plaintiff be awarded the following items of personal property:

a) Large Indian rugs given to the plaintiff by the defendant.

b) Kachina doll.

c) Twig outdoor furniture (five (5) pieces) or the Adirondack outdoor furniture (four (4) pieces), at the election of the defendant.

d) One (1) of the Bernease Mountain Dog puppies, or financial equivalent.

e) The oriental rug.

f) The antique toy trucks given to the plaintiff by her father.

g) The wooden bowl.

h) One (1) copy of the home videos.

II.

REAL PROPERTY

a. Marital Versus Separate Property

24. Utah's appellate courts have long held that once a trial court has determined marital property, the Court may distribute it equitably, regardless of which party's name appears on the title. Huck v. Huck, 734 P.2d 417, 420 (Utah 1986). "The trial court is empowered to make such distributions as are just and equitable, and may compel such conveyance as are necessary to that end." Jackson v. Jackson, 617 P.2d 338, 340-41 (Utah 1980).

25. The Court finds that Mr. Thomas, solely and exclusively, owned real estate in Sundance, Utah, before the parties were married. He owned the real estate free from any type of encumbrance. (The subject property is described in plaintiff's Exhibit 23.) The Court finds that Mr. Thomas commenced construction of a home on the property, and that it was framed up and many of the materials had been purchased before the parties were married. In addition, it is important to note that a lengthy access road had been constructed and power and sewer utilities have been placed on the premises. The Court finds Mr. Thomas continued to work on the home after the marriage, using materials previously obtained. This property ultimately became the parties' martial residence. Approximately one to one and one-half years after they were married, the parties obtained $27,000 from Mrs. Thomas's grandfather. This note was secured by a mortgage which had been reduced to approximately $17,000 at the time of trial (Exhibit 23).

26. The note was signed by both parties, as was the mortgage. Title was transferred to facilitate the security of the note payable to Mrs. Thomas's grandfather. The evidence is clear that Mr. Thomas did not make a gift of the home to Mrs. Thomas.

27. Mr. Thomas had a significant asset before the marriage and was able to use assets previously acquired to help complete the home for at least a year. Therefore, it would

be inequitable for the Court to divide the equity in the home equally, and permit Mrs. Thomas to have all of her stocks and bonds. It would not be equitable or consistent for the Court to award Mrs. Thomas all of her premarital property and her gifts and inheritance and award her one-half of Mr. Thomas's premarital property. That approach may force Mr. Thomas to sell his home, which would be much to the disadvantage of the children, and it would ignore the simple fact that he had a substantial asset for which he had worked for many years before the marriage and acquired before the marriage. It would also have a significant adverse effect upon his employment opportunities at Sundance for the following reasons:

a. Mr. Thomas has lived in Sundance since five years before the marriage, although not continuously until the home was habitable.

b. Since the Fall of 1983 he has lived there continuously and is very much involved in the social and political activities there. For example, he is the Fire Chief, member of the North Fork Special Services District, and Vice-Chairman for three years. He is a past president of the Homeowners Association, Chairman of the Architectural Committee, and he drafted the Architectural Covenants for the SCAPO subdivision.

c. Mr. Thomas earns his livelihood and established his business at Sundance, and has earned his livelihood almost exclusively in that community since 1977.

d. Given his income, it is not probable that he could acquire other accommodations in that community.

e. It would prove far more difficult for him to maintain his maintenance contracts if he were to leave the area.

28. Commencing sometime during the period of cohabitation and thereafter, the plaintiff made some modest contribution to the construction of the home including her own manual labor, the acquisition of building materials, the building of retaining walls, and

generally assisting the defendant who acted as the general contractor for the building of the home.

29. As stated above, generally, parties should retain their separate property that they brought into the marriage or that they might inherit during the marriage.

30. The ownership of the premises and the stage of improvement of the lot prior to marriage is not significantly disputed. The value of the asset prior to marriage can be established. It would be inequitable to grant plaintiff an interest for which she never worked for, nor contributed to.

31. The building lot had been conveyed to Mr. Thomas and significant improvements had been made prior to any contribution by Mrs. Thomas. This Court may always adjust property distribution to achieve an equitable result.

32. The Court values Mr. Thomas' premarital asset at $150,000. The Court specifically rejects Mr. Free's claim that the 1982 value could not be ascertained because of the credibility problems listed below. That consists of the building lot and its improvements including the foundation for the home, the partially framed home, the lengthy access road which was constructed and other improvements such as sewer, power, partial retaining walls, and the stockpiled supplies.

33. Beyond that interest, Mrs. Thomas is then entitled to an equitable share because of her maintenance and contributions. This appears to be a fair, just and equitable result because Mr. Thomas retains his clearly premarital interest, and Mrs. Thomas retains an equitable interest based upon her efforts. This equitable determination rejects both the position of plaintiff (commingling) and the position of defendant (exclusive ownership together with all appreciation).

b. Valuation of the Real Property

34. Trial courts are provided considerable discretion in establishing the value of real property. Such valuations are presumed valid and will not be overturned absent a clear

abuse of discretion. Morgan v. Morgan, 795 P.2d 684, 691 (Utah Ct. App. 1990). As stated in Morgan at 691, the trial court "is entitled to give conflicting opinions whatever weight it deems appropriate." There are conflicting opinions in this case. The Court establishes the value of the Sundance property as of the date of trial.

35. The plaintiff introduced evidence based upon the real property appraisal conducted by Gary Free and Associates which is based upon the "comparable sales approach" and concludes that the home has a current fair market value of $500,000.

36. The defendant introduced evidence based upon an appraisal conducted by Jud Harward who concluded that the home had a current fair market value of $355,000.

37. The Court is disinclined to accept the appraisal of the home at Sundance by Mr. Free, plaintiff's expert, for the following reasons:

a. Plaintiff's expert was uncertain of the comparables and some of the pictures of the "comparables" did not even correspond to the comparables which were relied upon. While this does not constitute a dispositive defect, it does reflect upon the accuracy of the appraisal and the credibility and integrity of the report.

On this issue, the Court agrees with Mr. Thomas. The Court is not impressed with the idea that the photos of the comparables are not required and therefore of little importance. In the Court's view, an appraisal is a comparison of properties. The photograph is a "snapshot" of the real property. If it is wrong, the appraisal could be misleading.

b. The comparables were not visited.

c. The quality of the materials and quality of workmanship in the comparables were considerably different than those used by Mr. Thomas. It is undisputed, specifically, that the materials to construct the Thomas cabin had

been previously used. The materials in the comparables were new. For example, the kitchen cabinets in the Thomas cabin are made of plywood.

d. Comparison of the garages were not accurate, as well as other items such as number of fire places, concern for avalanche danger, and degree of exposure to sun.

e. The Thomas home is not complete. It requires maintenance and repairs to make it marketable. The "Free" appraisal did not give sufficient weight to the true condition of the Thomas cabin.

f. Mr. Free and his associates had considerable difficulty in even locating the correct properties.

g. Of significant concerns to this Court was Mr. Free's failure to address the extant property line and easement problems associated with the property. Such problems can significantly delay the sale of a property and the Court is aware that title problems not only affect the marketability of a property, but also affect its value.

h. The "Free" appraisal also failed to address the difficulty of accessibility to the subject property and the significance of view.

38. Mr. Thomas testified of his personal knowledge of plaintiff's comparables because he was acquainted with each, and had performed work in many of the comparables and other cabins in the area. He testified concerning the significant differences in the quality of those properties compared to the Thomas cabin.

39. Next, the Court turns to the appraisal of Mr. Jud Harward. It is clear that Mr. Harward has considerable experience of appraising in Utah County area and in appraising property in Sundance.

40. The Court accepts Mr. Harward's appraisal based upon his experience and observations in appraising real estate in Sundance. Accordingly, the Court accepts the value of the cabin at $355,000.

41. The Court must consider costs associated with sale. It is undisputed that there are problems with the cabin before it could be marketable, including boundary line problems. There also are costs of repair. A real estate commission would be approximately 6%, plus closing costs (.06 x $355,000 = $21,300). Mr. Thomas testified that the sales costs would be approximately $31,900. The mortgage of approximately $17,000 would have to be paid.

$355,000	Sale Price
$ 17,000	Mortgage
$ 31,900	Commission and Realtor Fees
$306,100	Total Equity

42. The value of Mr. Thomas's interest at the time of marriage was $150,000. The Court has already addressed the issue of natural growth/appreciation. A fair division of the equity forces the Court to reject the appreciation factor given the contributions of the parties during their marriage and their circumstances at the time of the divorce. Newmeyer v. Newmeyer, 745 P.2d 1276, 12178 (Utah, 1987). Accordingly, Mrs. Thomas's equity is calculated as follows ($306,100 - $150,000 /2).

43. Therefore, the Court awards Mrs. Thomas an interest in the home at the value of $78,050.

44. The Court grants the defendant the option to either purchase the plaintiff's interest in the cabin or sell the cabin and divide the proceeds consistent with the above findings of fact.

45. The election to purchase the cabin should be exercised within 120 days from date hereon. Upon expiration, the cabin should be placed on the market for sale, with the parties cooperating in its listing, showing and selling and closing.

III.

CHILD CUSTODY AND VISITATION

46. As indicated above, the parties have two minor children: Joseph and Katie. This Court is charged with the duty respecting the future care and custody of Joseph and Katie as it deems appropriate.

This trial court is given broad discretion in making child custody awards. Sukin v. Sukin, 842 P.2d 922, 923 (Utah Ct. App. 1992). This Court has had the opportunity to witness the parties, to hear all of the evidence, to visit with the minor children and to judge the personal and individual circumstances of this case.

As provided by statute, "in awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the (children), including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate." 30-3-10(2) U.C.A., 1953 as amended. In determining custody, the Court is to consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. 30-3-10 U.C.A., 1953 as amended.

47. This Court shall consider the "best interests of the child" as an important factor, but will also consider past conduct and moral standards of the parties and which parent will act in the child's best interest and other relevant factors such as keeping the siblings together, and each child's bond with each parent.

48. It is apparent that Joseph and Katie get along well, participate in activities together, and are a mutual support of each other. As noted in Dr. Stewart's report, there is a firm sibling bond. Accordingly, it is in their best interests not to be separated. This Court did not inquire as to the preference of Joseph or Katie because neither child is sufficiently mature of age and capacity to reason so as to form an intelligent preference regarding legal custody.

49. Both parents truely have a sincere desire for custody. This Court has carefully examined a custody evaluation report of Dr. Jay P. Jensen, a clinical psychologist, dated March 21, 1995. He, by stipulation, was appointed friend of the Court. In addition, the Court carefully examined the custody evaluation report of Dr. Elizabeth B. Stewart, also a clinical psychologist, dated December 1, 1995. Both of these fine professionals testified at trial. Dr. Stewart had the benefit of Dr. Jensen's report when making her report and adopted/supported some of his findings and conclusions and criticized others. This Court would have favored an analysis which did not rely upon or disparage that of the party-stipulated friend of the Court. The Court has relied, in part, on both evaluations for guidance, but the Court does not accept either in total.

The two custody evaluations performed in this case appear to agree on a number of important points and disagree on some critical issues. Dr. Jensen recommended that custody be given to the father or, in the alternative, a modified joint custody arrangement be worked out. Dr. Stewart recommends that custody be awarded to Mrs. Thomas.

50. This is a complicated case with no easy, clear-cut answers. Both of these parents seek custody, are competent and definitely love their children. Both have personal, professional lives which somewhat complicate custodial arrangements. The children have been isolated in their Orem neighborhood because they attend a non-neighborhood school, Orchard Elementary, where their mother teaches. In addition, they have been somewhat isolated in their Sundance neighborhood because of the paucity of playmates and distance between cabins, etc.

51. Ann Thomas was the primary caretaker for the children prior to the parties' separation.

52. Prior to the parties' separation, and since, Ann Thomas has performed well as the mother of the children.

53. The defendant has also acknowledged that Ann Thomas is a competent, caring mother who has indeed been the primary care giver for the children throughout their lives.

54. As the primary care giver of the children, Mrs. Thomas has seen to their day-to-day needs, typically been the parent who has been home when they return from school, assisted the children with their school work, made sure the children received appropriate medical and dental care, typically transported the children when such was necessary, entertained the children, disciplined the children, and so forth. Mr. Thomas has also contributed and been involved in these activities. The Court finds Mr. Thomas has been involved with the children's schooling, health care, religious training, and day-to-day activities. He has attended parent/teacher conferences, he has taken the children to doctors, dentists, and other activities.

55. The children interact with Ann Thomas as their primary care provider and have established confidence in her as their primary care provider.

56. The parties have, since their separation in March of 1993, entered into an arrangement of shared custody. The Court finds the arrangement which was been heretofore set forth in prior court orders has provided that the time the children spent with each parent has been approximately equal. The Court finds that for approximately half of the life of the youngest and one-third of the life of the oldest child, that they both have enjoyed a relationship with both of their parents wherein they have shared approximately equal time. The arrangement has worked somewhat well as these arrangements go. But the children have suffered from some instability and moving back and forth.

57. The Court finds that Mr. Thomas has been involved with the children on a daily basis until the separation. Mr. Thomas conducts business out of his home which has permitted him to be involved in the children's daily activities since they were born. Since the parties' separation, the children have also had an opportunity to rely upon their father for

meeting their needs to a greater extent than existed prior to separation. The children have flourished in the relationship they have with Mr. Thomas.

58. The children's social needs are being principally met through their associations at school.

59. The defendant's residence in Sundance, Utah County, does not afford a substantial amount of peer interaction for the children, but they have close friends there. In addition, the children have not established close friendships in their mother's neighborhood.

This Court would prefer some type of modified shared joint custody arrangement. But Dr. Stewart has made a compelling argument that a shared custody arrangement is not in the best interests of the children and is not workable in the long term. Thus, this Court will focus on custody by the mother, or by the father.

60. The appearance of Señor Pedro Sauer in an emotional and sexual relationship with Ann Thomas during this marriage is a very complicating factor.

61. Mr. and Mrs. Thomas separated in March of 1993. Mrs. Thomas, unbeknownst to Mr. Thomas, had commenced a relationship with Pedro in October or November of 1992. Mr. Pedro Sauer was then, and was at the time of trial, a married man.

62. From all the trial testimony and reports of the evaluators, what facts do we glean about Pedro?

a. He is not a citizen of the United State of America.

b. He is Brazilian and has entered the United States by virtue of a work permit.

c. He is a martial arts instructor in Jiu Jitsu at a health club.

d. He is married, and his wife and small children live in Orem, Utah. He has several small children.

e. It is somewhat unclear when Pedro entered into a sexually intimate relationship with Mrs. Thomas, but the romantic relationship commenced in

1992. Mrs. Thomas reported to Dr. Jensen that she met Pedro in October and had a relationship by November of 1992. Mr. Thomas believed the relationship had started as early as June of 1992.

f. During the pendency of this action, Pedro fathered a child during a time of reconciliation with his wife, while still maintaining an intimate relationship with Mrs. Thomas.

g. After commencing a relationship with Mrs. Thomas, Pedro was charged with domestic violence with his wife.

h. Pedro, a non-citizen of the United States, was charged with possession of a firearm/revolver at Lake Powell in the company of Mrs. Thomas. This may have also violated his work permit status in the United States.

i. Pedro, in his young marriage and with several young children, has participated in other adulterous affairs.

j. He now has a divorce pending in the Fourth District Court which is set for September of 1996.

k. His wife enjoys entry into the United States because of the work status of Pedro. A divorce will result in her deportation from the United States and her re-entry is in question. The future custodial status of their children is unknown. This could significantly affect the Pedro/Mrs. Thomas dynamics if some or all of the children remain here, particularly any child born in the United States and who would automatically enjoy citizenship.

l. Mrs. Thomas reported to Dr. Jensen that her relationship with Pedro "had a dramatic effect" on the ultimate breakup of the Thomas family.

m. Mrs. Thomas perceives Pedro as "a very positive male role model. . ." (Report of Dr. Jensen, p. 10).

63. The Pedro/Ann Thomas relationship has continued for several years and while no one can predict the future, it appears to this Court that it is their intention to marry when they are legally able. As mentioned above, his divorce trial is scheduled for September of 1996.

64. This Court had hoped Mr. Sauer's divorce would have been completed earlier in order to evaluate his true motives, and then to have evaluators thoroughly and fully consider his relationship to these minor children, his commitment to Mrs. Thomas, his relationships with any other women and his obligations to his children and his ex wife.

65. The Court has entertained the testimony of Pedro Sauer and his wife. He represented himself as a responsible individual, but is not. He has undertaken activity which would be considered detrimental to the Thomas children.

66. Based upon the evidence of Mr. and Mrs. Sauer and others, the Court does find a "link" or connection that would suggest that the relationship between the plaintiff and Mr. Sauer has negatively impacted the children, or will negatively impact the children in the future.

67. The evaluators can make no "objective" link between the "affair" and its impact upon the children. The fact of the matter is that they are young and may not appreciate the consequences of a fairly discreet sexual affair. But the relationship has affected the family.

a. The affair has impacted the family financially. The testimony is that Mr. Sauer has not contributed financially to the family despite the frequency of his overnight stays. In addition, scarce resources have been expended on Pedro for gifts and travel;

b. The affair eventually resulted in a confrontation at the children's home with Mrs. Sauer. That exposure, albeit brief, is not positive for the children;

c. Mrs. Thomas's affair with a convicted criminal is of concern to this Court. His spousal abuse charge during this time is of concern to this Court as is his

illegal possession of a weapon. The weapon was possessed in the company of Mrs. Thomas on a trip to Lake Powell and was attempted to be retrieved at a time of confrontation. Such activity always places the children's mother at risk and such illegal choices can potentially, negatively affect the family.

d. Mr. Sauer "had a dramatic effect" on the ultimate breakup of the Thomas family. That breakup has affected these children significantly, dramatically and in a myriad of ways.

68. The reason this case is so troubling is because of Pedro Sauer and his negative influence on the family. Absent his entry, and his influence, it is clearly in the best interests of the children to be awarded to Ann Thomas. With Pedro in the picture, which he is and intends to be, it is not in the best interests of the children to be in the home and subjected to the negative influences and example of Pedro.

69. This Court is profoundly concerned with Mrs. Thomas's observation that Pedro is "a very positive role model." She has been duped by his suave, debonair and romantic influences and has overlooked his less than desirable characteristics; immorality, social irresponsibility, his womanizing and infidelity, his criminal activity and his spousal abuse. This Court cannot conceive how Pedro is a positive role model for little Joseph. To that extent Ann Thomas does not have the best interests of her children at heart.

70. Mr. Thomas offers a more stable environment to the children. On the issue of stability, the Court concurs with Dr. Jensen that:

a. Mr. Thomas is a greater source of stability in the children's lives (Exhibit 1 page 15, Conclusions and Recommendations).

b. Mr. Thomas will not threaten the children's integration into their present environment by a change in residence. Mr. Thomas has indicated that he plans to remain in this area where his business is established. It is the area where the children were born. He plans to continue to rear the children in these

familiar surroundings. At earlier stages of the separation, Mrs. Thomas wished to move from the area regardless of the separation of the children from their father.

c. Mr. Thomas has no plans to diminish Mrs. Thomas's role in the children's lives.

d. Mr. Thomas was not unfaithful in the marriage and has set a better example in this regard.

e. There is no indication that Mr. Thomas would subject the children to the deleterious effects of a relationship such as Mrs. Thomas has done.

f. Mr. Thomas has maintained the proper orientation to his family and is more interested in the children having a meaningful relationship with both parents.

71. Based upon the above, the Court believes it is in the long term best interests of the children to award their custody to Mr. Thomas subject to generous, liberal and frequent visitation by Mrs. Thomas. This award will allow the children the stability of the home, which they have known from birth, will allow them to continue in the same school and will allow them to have daily contact with their mother there. This arrangement will provide Mrs. Thomas with sufficient recreational time, as well as work time/discipline time with the children.

IV. CHILD SUPPORT

72. Mr. Thomas is entitled to child support for the care and custody of Katie and Joseph. Practically speaking it is difficult to assess the income of Mr. Thomas because of his self-employment status and the legal measures set up for financing his business. In addition income generated from a construction business is volatile from year to year and is sensitive to the economy. Likewise it is also difficult to assess Mrs. Thomas's income because she historically enjoyed the benefit of an inheritance of stocks and bonds exclusive to her. There

is testimony that that source has been exhausted, but nonetheless she had substantial income from the sale of stocks and bonds during the tax year prior to trial.

73. The Court finds Bert Thomas was self-employed, and had numerous tools and two trucks at the time he married Mrs. Thomas. He earns a living using his tools.

74. The Court finds that Mr. Thomas owns a business known as Bert Thomas Construction, Inc. (BTCI). Mr. Thomas performs the following tasks with respect to the business: he performs all of the bidding, purchases all of the materials, answers the telephone or otherwise handles all inquiries, pays all bills, deals with all employees, and has so been involved for approximately twenty years at Sundance. He has periodically worked with Dwight Hooker as an employee.

75. Mr. Thomas has set up, pursuant to the advice of his accountant, an investment company called Thomas Investments. This accounting arrangement allows him to earn passive income through the investment company without Social Security contribution.

76. The Court finds Mr. Thomas has confined virtually all of his work to the Sundance area. He remodels and maintains homes in this area. He has also built a few homes in the Sundance area.

77. The Court finds Mr. Thomas's income is derived from two sources: (1) Bert Thomas Construction Company, a corporation, and (2) Thomas Investment. There is not anything irregular or inappropriate with respect to his income from either the construction company and investment companies as verified by both Ann and Bert's accountants.

78. The Court finds Mr. Thomas has income which comes from the investment company. The Court finds the arrangement has been set up so that Mr. and Mrs. Thomas could receive passive income, thus reducing their withholding to Social Security. According to Mrs. Thomas's expert there does not appear to be any inappropriate expenditures, or any unaccounted for funds, or inappropriate accounting conducted by Thomas. Moreover, there does not appear to be any significant benefits to Mr. Thomas, from either the construction

company or the investment company. While employees of the construction company did minor work on the home, part of the home is listed as an asset of the investment company and is used as an office, shop, bathroom and storage area.

79. Mr. Thomas has been a reasonably successful contractor earning, typically during the years just prior to separation, approximately $70,000 per year.

80. The Court relies upon the exhibits introduced in connection with the testimony of Derk Rasmussen, CPA, consisting of Exhibits 7 through 19.

81. Mr. Rasmussen conducted an in depth review of the parties' savings account and checking account activity in order to determine the availability of cash to the family, the expenditures of cash, the income of the defendant and the projected income of the defendant.

82. The defendant has testified that his income and business activity has been about normal during the pendency of the case.

83. The trend in Utah County residential construction has been an increasing trend, and the Bert Thomas Construction revenue trend has approximately kept pace with that increase, see Exhibit 12.

84. Inexplicably and contrary to the defendant's own testimony, the actual Bert Thomas Construction revenue has declined sharply since separation regardless of the trend of residential construction in Utah County and the previous Bert Thomas Construction trend, see Exhibit 13.

85. It would be appropriate to average the income of Mr. Thomas to determine what his actual income earning capacity is. However, it would be inappropriate to give the same weight to post-separation years as to pre-separation years.

86. Therefore, the Court adopts the average set forth in Exhibit 16 for Mr. Thomas's income at $69,567 per year, gross and before taxes, which is an average of the income from the years 1988 to 1992.

87. The plaintiff's income from her sole employment is $25,824 gross per year.

88. Child support should be based upon the Child Support Guidelines for the State of Utah attributing $5,797 per month as gross income to the defendant and $2,152 per month to the plaintiff.

89. Based upon the foregoing, child support should enter consistent with the Guidelines. Counsel for defendant is instructed to prepare the necessary Child Support Obligation Worksheet. Total child care paid by Mr. Thomas from February, 1994 through March, 1996 was $2,080. His actual responsibility for payment of child care was $438. He is therefore entitled to a credit of $1,642.

V.

ALIMONY

90. The issue of alimony is reserved. It is necessary to resubmit financial statements which now reflect the award of custody. An alimony award is highly fact specific and the previous financial statement of plaintiff mixed the financial needs of the children with her own. The custody award will affect the financial condition and needs of the receiving spouse and may also affect the payor's ability to provide support. In addition, defendant's claim respecting overpayment is reserved.

VI.

PENSION, RETIREMENT BENEFITS, MISCELLANEOUS, ETC.

91. Health care insurance and health care costs. The children should be maintained on Mrs. Thomas's health care plan. Each party should pay one-half of any unreimbursed routine health care costs. Any non-routine medical, dental, or orthodontic care costs must be agreed upon by the parties before any such cost is incurred. The Court finds Mrs. Thomas terminated Mr. Thomas from her health insurance. Although the insurance coverage was reinstated, as a result, Mr. Thomas incurred and paid health care costs in the amount of $1,944, which should have been paid by her insurance. Mr. Thomas is entitled to a credit in

that amount against her interest in the home (See Exhibit 53). If Mrs. Thomas is able to obtain a refund from the insurance company, she may have it.

92. Costs of custody evaluation. Mr. Thomas should be reimbursed for the costs of the friend of the court's custody evaluation performed by Dr. Jay Jensen.

93. Tax deductions. Each party is entitled to claim one of the children as a dependent for tax purposes.

94. Debts. Mr. Thomas shall be responsible for his debts and obligations including those of the corporation. Mrs. Thomas shall be responsible for her own debts and obligations.

95. Costs of litigation. Each party shall be responsible for his or her own costs of litigation, which includes attorney fees, costs, cost of appraisals and expert witnesses.

96. Retirement. Mr. Thomas is entitled to a qualified domestic relations order. The date of the marriage is July 17, 1982. The date of the divorce is August 13, 1996. Mr. Thomas is entitled to be paid his interest in the retirement pursuant to the terms and conditions of the plan. The ratio which he is entitled to receive is as follows:

$$.5 \times \frac{\text{total \# of years married during which Mrs. Thomas was teaching}}{\text{total \# of years Mrs. Thomas will have taught at retirement}}$$

Mr. Thomas is entitled to be designated as a fifty percent (50%) survivor.

97. The Court finds Mr. Thomas is also entitled to one-half of a school bus credit to which he was entitled by virtue of paying taxes on the home in Sundance. Mrs. Thomas collected this credit in the amount of $400.

VII.

98. The parties are ordered to cooperate in the effectuation of these terms and conditions. Counsel for defendant is instructed to prepare findings of fact and conclusions of law and a decree consistent with this decision.

Dated this 19 day of August, 1996.

BY THE COURT

LYNN W. DAVIS, JUDGE

cc: Frederick Green, Esq.
Brent Young, Esq.

Bert Thomas Construction, Inc.

Income Statements

For Years Ending December 31st

	1988	%	1989	%	1990	%	1991	%	1992	%	1993	%	1994	%
Total Revenues	$ 305,362	100%	$ 381,518	100%	$ 242,097	100%	$ 201,965	100%	$ 814,458	100%	$ 367,915	100%	228,760	100%
Cost of Goods Sold	140,714	46%	187,744	49%	113,361	47%	91,507	45%	490,136	60%	166,427	45%	51,035	22%
Gross Profit	164,648	54%	193,774	51%	128,736	53%	110,458	55%	324,322	40%	201,487	55%	177,725	78%
Costs and Expenses														
Bank Charges	256	0%	342	0%	0	0%	102	0%	113	0%	186	0%	29	0%
Contributions													175	
Dues and Subscriptions	125	0%	148	0%	140	0%	77	0%	43	0%	1,109	0%		0%
Employee Benefits	611	0%	811	0%	926	0%	719	0%	1,050	0%	0	0%		0%
Entertainment & Meals													212	
Gas/Auto	1,823	1%	2,744	1%	961	0%	2,857	1%	3,506	0%	6,587	2%	6,125	3%
Insurance	1,470	0%	2,724	1%	1,413	1%	2,848	1%	2,907	0%	7,813	2%	4,955	2%
Interest Expense													55	
Legal & Accounting	2,394	1%	1,890	0%	2,150	1%	1,737	1%	2,715	0%	2,348	1%	2,928	1%
Lease Expense	19,116	6%	19,273	5%	19,116	8%	0	0%	15,000	2%	15,116	4%	14,000	6%
Misc. Expense	473	0%	45	0%	558	0%	279	0%	1,178	0%	933	0%		0%
Office Supplies	2,874	1%	526	0%	285	0%	1,072	1%	485	0%	1,555	0%	3,634	2%
Outside Services		0%	100	0%	165	0%	0	0%	0	0%	636	0%		0%
Payroll Taxes	12,547	4%	17,672	5%	10,450	4%	17,427	9%	33,790	4%	27,902	8%	24,944	11%
Penalties													131	
Repair/Maintenance	513	0%	76	0%		0%	0	0%	514	0%	1,694	0%	3,067	1%
Payroll	50,104	16%	62,173	16%	37,117	15%	61,466	30%	142,458	17%	131,614	36%	71,873	31%
Officers' Compensation	17,800	6%	75,017	20%	28,372	12%	36,000	18%	36,000	4%	35,400	10%	36,000	16%
Thomas Home Payroll		0%	4,610	1%	14,673	6%							-	
Supplies	6,408	2%	1,140	0%		0%	293	0%	3,000	0%	2,022	1%	563	0%
Taxes and Licenses	203	0%	14,821	4%	38,833	16%	1,970	1%	15,873	2%	4,813	1%	500	0%
Utilities and Telephone	1,051	0%	1,459	0%	0	0%	0	0%	35	0%	1,840	1%	934	0%
Total Costs and Expenses	117,769	39%	205,570	54%	155,159	64%	126,847	63%	258,667	32%	241,568	66%	170,125	74%
come	$46,879	15%	($11,797)	-3%	($26,423)	-11%	($16,389)	-8%	$65,655	8%	($40,081)	-11%	7,600	3%
Adjustments to Net Income:														
Officer's Compensation	$ 17,800		$ 75,017		$ 39,000		$ 36,000		$ 36,000		$ 35,400		$ 36,000	
Personal Cost of Goods Sold			851		1,091									
Lease Expense	19,116		19,273		19,116		0		15,000		15,116		14,000	
Personal Payroll Expense	0		4,610		7,037		0		0		0		0	
	$ 83,795		$ 87,954		$ 39,821		$ 19,611		$ 116,655		$ 10,435		$ 57,600	

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 14
CASE NO.
DATE REC'D IN EVIDENCE
CLERK

Bert Thomas Historical Income

Year	Income
1988	$ 83,795
1989	87,954
1990	39,821
1991	19,611
1992	116.655
1993	10,435
1994	57,600
Average	$ 59,410

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 15
CASE NO.
DATE REC'D IN EVIDENCE
CLERK

Bert Thomas Historical Income
Prior to Separation

Year	Income
1988	$ 83,795
1989	87,954
1990	39,821
1991	19,611
1992	116,655
Average	$ 69,567

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 16
CASE NO. _____
DATE REC'D IN EVIDENCE _____
CLERK _____

on his own motion, recused himself due to the colorable claim of prejudice.

Pursuant to our holding regarding section 77–29–1, the convictions are reversed and the charges are dismissed with prejudice.

HOWE, A.C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

Mary M. THRONSON, Plaintiff and Appellant,

v.

Charles H. THRONSON, Defendant and Appellee.

No. 890547–CA.

Court of Appeals of Utah.

March 25, 1991.

Rehearing Denied May 21, 1991.

In a divorce action, the Third District Court, Salt Lake County, David S. Young, J., entered a divorce decree and awarded joint legal custody of the parties' child, child support, alimony and property division. Wife appealed. The Court of Appeals, Jackson, J., held that: (1) amendments to child custody statute deleting rebuttable presumption favoring joint legal custody was a substantial and substantive amendment and thus could not be applied retroactively; (2) court abused discretion in imposing joint legal custody on parents without statutorily required parental agreement; (3) findings were inadequate to support child custody award; (4) child support award had to be reconsidered including income from nonearned sources and husband's current earnings in making calculations; and (5) wife was entitled to alimony of $800 per month on a permanent basis, rather than for only one year.

Remanded in part, modified in part and otherwise affirmed.

1. Parent and Child ⇐3.3(1)

Amendments to child custody statute deleting rebuttable presumption favoring joint legal custody was a substantial and substantive amendment and thus could not be applied retroactively. U.C.A.1953, 30–3–10.2.

2. Divorce ⇐299

Trial court abused its discretion in imposing order of joint legal custody on parents and child without statutorily required parental agreement and in the face of parental opposition. U.C.A.1953, 30–3–10.1 to 30–3–10.4.

3. Divorce ⇐301

Findings were inadequate to support child custody award where court utilized best interest factors related to joint legal custody, not those related to child custody, findings were in conflict as to whether court or parents should determine visitation rights, findings did not support award of any physical custody, and custody was awarded on the basis of court imposed visitation time allocation. U.C.A.1953, 30–3–10, 30–3–10.2(3).

4. Divorce ⇐306

In determining appropriate child support award, parental income had to include consideration of income from nonearned sources, as well as current earnings of husband, rather than average of husband's earned income over several years. U.C.A. 1953, 78–45–7.4, 78–45–7.5, 78–45–7.5(1)(a), (5)(b), 78–45–7.5 to 78–45–7.7.

5. Divorce ⇐240(2)

Award of $800 alimony to wife on a permanent basis, rather than for only one year, was warranted based on consideration of wife's earning capacity as a full-time pharmacist and her necessary monthly living expenses, and husband's current gross capacity and his actual and necessary monthly living expenses.

Paul H. Liapis (argued), Helen E. Christian, Kim M. Luhn, Gustin, Green, Stegall & Liapis, Salt Lake City, for plaintiff and appellant.

Clark W. Sessions (argued), Dean C. Andreasen, Campbell, Maack & Sessions, Salt Lake City, for defendant and appellee.

Before BENCH, GARFF and JACKSON, JJ.

OPINION

JACKSON, Judge:

Mary Thronson appeals provisions of a divorce decree and separate order awarding joint legal custody of a child, child support, alimony, and property. We remand for further proceedings regarding child custody and support. We modify the alimony award and affirm the remainder of the decree.

FACTS

The parties were married on September 30, 1978. Their marriage was the first for both. She was a full-time pharmacist and he a full-time attorney. A son was born to them on September 11, 1981. She became the child's primary caretaker and a part-time pharmacist. He became a shareholder in his law firm. She filed a complaint for divorce. He filed a counterclaim for divorce. They were divorced by a decree entered June 23, 1989. A separate order of joint legal custody was also entered. Further relevant facts will be set forth below in our treatment of the respective issues.

CHILD CUSTODY AWARD

Ms. Thronson challenges the joint legal custody decree and order on two grounds: (1) She did not agree to the order of joint legal custody and Utah Code Ann. § 30–3–10.2 (1989) required the agreement of both parents at the time of this decree and order. (2) The provision for an automatic award of sole custody to one parent when the other moves from the state was error.

CHILD CUSTODY IN UTAH

Prior to 1988, Utah did not have a statute expressly authorizing an award of "joint legal custody" [1] of a child. Our divorce statutes have contained various child custody provisions since 1903. For many years Utah Code Ann. § 30–3–5 (1989) has authorized district courts to include in divorce decrees "equitable orders relating to the children, property and parties." Further, Utah Code Ann. § 30–3–10 has contained various specific provisions regarding factors to be considered in awarding sole custody of a child. *See Lembach v. Cox*, 639 P.2d 197 (Utah 1981); 1 Utah L.Rev. 363 (1989) (historical development of child custody factors and preferences in Utah).

"Joint Legal Custody" was specifically added to the sole custody statute in 1988, and designated as § 30–3–10.1 to –10.4. We emphasize that this is a joint "legal" custody statute and not a joint "physical"

1. Custody terminology: Many legislators, judges and writers have been loose with their "joint" custody language. Early articles identified this vexing problem as follows:

> Both the forms of custody [sole, divided, split, joint] following divorce and the terms which describe them are vague and overlapping. The lack of standard definitions and the courts' tendency to use certain terms interchangeably have created confusion.

Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.Davis L.Rev. 523, 525 (1979).

> Often, when referring to one of these custody arrangements, courts use vague language or inadequately defined terms.

Bratt, *Joint Custody*, 67 Ky.L.J. 271, 283 (1978–79).

One author points out that considerable semantic confusion has resulted possibly because the "term" joint custody predates the "concept" of joint custody as it is known today. He states: "I have encountered at least fifteen terms used to refer to various alternatives to sole custody: joint legal custody, joint physical custody, divided custody, separate custody, alternating custody, split custody, managing conservatorship, possessory conservatorship, equal custody, shared custody, partial custody, custody 'given to neither party to the exclusion of the other,' temporary custody, shifting custody, and concurrent custody." Miller, *Joint Custody*, 13(3) Fam.L.Q. 345, 360 n. 79 (1979).

custody statute. In the 1988 Utah legislative session, Senator Hillyard stated: "This is not joint physical custody. The child obviously can't live in two homes. But it's joint legal custody which would give the non-custodial parent more involvement in the decisions of child raising." Floor Debate, (Feb. 3, 1988) Sen. Recording No. 42, side 2. In section 10.1 the legislature provided its definition of joint legal custody:

> In this chapter, "joint legal custody"
>
> (1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;
>
> (2) may include an award of exclusive authority by the court to one parent to make specific decisions;
>
> (3) does not affect the physical custody of the child except as specified in the order of joint legal custody;
>
> (4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and
>
> (5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

Utah Code Ann. § 30–3–10.1 (1989). Subsections (1) and (2) define joint legal custody: both parents share the authority and responsibility to make basic decisions regarding their child's welfare. Subsections (3), (4) and (5) tell us what joint legal custody is not—it is not joint physical custody. We note that this statute does not contain a definition of nor a provision for "joint physical custody."

Subsection 10.2(1) created a "rebuttable presumption" that joint legal custody is in the best interest of a child. But, that presumption was made subject to subsection (2) which provided:

> The court may order joint legal custody if it determines that:
>
> (a) both parents agree to an order of joint legal custody;
>
> (b) joint legal custody is in the best interest of the child; and
>
> (c) both parents appear capable of implementing joint legal custody.

Utah Code Ann. § 30–3–10.2 (1989).

The order remains discretionary with the court, not mandatory, even when all three conditions are satisfied, i.e., (1) parental agreement, (2) best interests, and (3) parents capable of implementation. Further sections of the statute emphasize its "parental agreement" posture. We note that section 10.3—terms of joint legal custody order—contains two further subsections dealing with parental agreement:

> (2) The court shall, where possible, include in the order the terms agreed to between the parties; ...
>
> (5) The agreement may contain a dispute resolution procedure the parties agree to use....

Utah Code Ann. § 30–3–10.3 (1989). Moreover, the termination provisions, section 10.4, confer upon one parent the right to unilaterally terminate the order of joint legal custody. The order can be terminated simply by filing and serving a motion. Once the motion is filed, the court is required to replace the order "with an order of sole legal custody under Section 30–3–10." Utah Code Ann. § 30–3–10.4 (1989). This provision emphasizes the parental agreement stance of the statute as initially adopted and in force at the time of this divorce.

We return to section 10.2(3) to point out that the legislature created a list of factors the court *shall* consider in determining the best interest of a child in the context of joint legal custody (not joint physical custody). Those factors are:

> (a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;
>
> (b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
>
> (c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;

(d) whether both parents participated in raising the child before the filing of the suit;

(e) the geographical proximity of the homes of the parents;

(f) if the child is 12 years of age or older, any preference of the child for or against joint legal custody; and

(g) any other factors the court finds relevant.

Utah Code Ann. § 30–3–10.2(3) (1989). On the other hand, the legislature did not offer any guidance to trial courts to assist in determining the "capability" of the parents. The term is not defined. Section 10.4 contains provisions for (1) modification of a joint legal custody order, (2) termination of the order discussed above, and (3) attorney's fees based on frivolous pleadings and harassment. Utah Code Ann. § 30–3–10.4 (1989). The modification provisions appear to be a codification of the *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982) bifurcated procedure used in sole custody modifications. Prior to adoption of this statute in 1988, the only reported Utah case dealing directly with an initial award of "joint custody" was *Lembach v. Cox*, *supra*. There, the court stated "a custody arrangement, joint or otherwise, is within the broad equitable powers of the court." Further, the court said "[t]he fact that the father and the mother could not negotiate a joint custody arrangement demonstrates the inappropriateness of ordering joint custody." 639 P.2d at 200.[2]

Prior to 1980, a handful of states including California had adopted various forms of "joint custody" statutes. During the 1980's "joint custody" was in vogue and a second wave of states adopted "joint custody" statutes. Utah became the thirty-second state (and apparently the last) caught up in this wave. 2 *Family Law and Practice*, § 32.04 (A. Rutkin ed. 1990 & Supp.) (hereinafter "Fam. Law").[3]

California, the acknowledged pioneer of no-fault divorce and joint custody, retrenched in 1988 regarding joint custody. California's 1979 statute contained a "presumption ... that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody." Cal.Civ.Code § 4600.5(a) (West 1979). In 1983, California amended its joint custody statute to include a specific definition of both "physical" custody and "legal" custody. The California Legislature recognized the need to be more specific when in 1983 it defined *joint legal custody* to mean "both parents shall share the right and responsibility to make decisions relating to the health, education and welfare of the child," Cal.Civ.Code § 4600.5(d), and defined *joint physical custody* as "each of the parents ... [have] significant periods of physical custody." Cal.Civ.Code § 4600.5(d)(5) (West 1988). A team of Stanford professionals proposed the need

2. Other Utah reported cases involving joint custody are: *Moody v. Moody*, 715 P.2d 507 (Utah 1985) (modification hearing of an initial award of joint custody); *Becker v. Becker*, 694 P.2d 608 (Utah 1984) (on modification hearing, it was noted that trial court considered joint custody but did not order it in initial decree).

3. The child custody reform of the eighties gained impetus from ongoing no-fault divorce legislative reform. Utah added "irreconcilable differences" to its list of nine fault-based grounds in 1987. Utah Code Ann. § 30–3–1(3)(a) (1987). "Both reforms took place with no public commitment or private initiative for the systematic assessment of the legal changes on patterns of custody or on child welfare. As fashions change and new interest groups emerge, family law is at risk of becoming a series of experiments that never report results in ways that can help inform the legislative process." Zimring, *Foreword* to Sugarman & Kay, *Divorce Reform at the Crossroads*, at viii (1990). As no-fault made divorce virtually automatic, fathers' groups began to protest a pro-mother bias in child custody decisions. At the same time, feminist groups began attacking legal standards which were gender-specific as inherently discriminatory. Then, fathers' groups turned the idea of gender-neutrality to their advantage in the child custody arena. These opposing forces set the stage for "joint custody" statutes based on the rationale of "equality" rather than "equity" and children end up taking a back seat to the drivers, i.e., their divorcing parents. One writer succinctly summed up the result: "This modern trend illustrates a move backward toward the more explicit treatment of children as property—only this time the property is to be divided equally." Fineman, *Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking*, 101 Harv.L.Rev. 727, 739–40 (1988).

to consider "joint custody" as having a third form—the actual residential arrangement for the child.[4] Later, a California Task Force recommended that existing joint custody provisions be clarified to indicate that no statutory presumption exists in favor of joint custody. In response, subsection (d) was added:

> This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the courts and the family the widest discretion to choose a parenting plan which is in the best interests of the child or children.

Cal.Civ.Code § 4600(d) (West Supp.1989).

[1] Coincidentally, while this appeal was pending, the 1990 Utah Legislature substantially amended its two year-old joint legal custody statute deleting the "rebuttable presumption" favoring joint legal custody. *See* Utah Code Ann. § 30–3–10.2 (1989 & Supp.1990). However, the legislature retained its initial definition of "joint legal custody," section 30–3–10.1, and the list of seven factors courts are required to consider in determining the best interests of the child in the context of joint legal custody. Section 30–3–10.2(3)(a–g). Also retained in the statute is some language regarding parental agreement: "The court shall, where possible, include in the order [joint legal custody order] the terms *agreed to between the parties* [parents]," § 30–3–10.3(2) (emphasis added), and, "The agreement may contain a dispute resolution procedure the parties *agree to use*...." § 30–3–10.3(5) (emphasis added). Utah Code Ann. § 30–3–10.3 (1989). Our legislature's change of position on the "rebuttable presumption" in favor of joint legal custody and the necessity of parental agreement creates confusion concerning the public policy basis for the joint legal custody statute. Utah and California appear to be the first and only states to retrench from a presumption in favor of joint (legal) custody after having adopted the presumption. Due to the paucity of pre-statute and absence of post-statute joint custody reported decisions in Utah, plus the fact that Utah's statute is not like that of any other state, we are left to decide an issue of first impression with little useful precedent. Mr. Thronson argues that we should apply the 1990 version of the joint legal custody statute, i.e., apply the amendments retroactively. We decline to do so. The 1990 amendments did not make a mere procedural change or simply clarify how the 1988 statute should have been understood originally. The amendments were substantial and substantive, thus retroactive application is not appropriate. *See In re J.P.*, 648 P.2d 1364, 1369 n. 4 (Utah 1982).

ANALYSIS OF JOINT LEGAL CUSTODY AWARD UNDER § 30–3–10.1 to –10.4

As noted above, the majority of states have adopted statutes expressly authorizing some form of "joint custody" award. Those statutes come in four basic forms:

1. joint custody as an option only where the parties petition or agree;
2. joint custody as an option;
3. joint custody as a presumption or preference;
4. joint custody split into joint legal custody and joint physical custody.

Fam.Law, § 32.06[2]. Initially, Utah combined forms 1 and 3. Now, Utah is form 2, but only as to joint "legal" custody. Here, the trial court faced Utah's initial statute with a favorable presumption on one hand and the requirement of parents' agreement on the other. Ms. Thronson opposed a joint custody order. The trial court failed to meet the parental agreement requirement head-on. Instead, the court found "there exists substantial difficulty between the parties" and "it is in the best interests of the child for the parties to be awarded *joint legal custody.*" The court failed to

4. "There are actually three aspects of joint custody: the legal custody agreement, the physical custody agreement and the actual residential arrangement for the child. It is important to investigate the three forms of joint custody separately to understand the implications of each for the functioning of the post-divorce family." Albiston, Maccoby, & Mnookin, *Does Joint Legal Custody Matter?*, Stan.L. & Pol'y Rev. 167, 168 (1990).

find whether the parents agreed or disagreed as to an order of joint legal custody. At the time the court ruled, the statute stated:

> The court may order joint legal custody if it determines that:
>
> (a) both parents agree to an order of joint legal custody ... Utah Code Ann. § 30–3–10.2(2)(a) (1989).

The form of the statute required a threshold finding of parental "agreement." The trial court implicitly found "disagreement" but proceeded with the order. Moreover, the record reveals opposition to the order, i.e., no agreement. Several states have adopted the "parental agreement" form of joint custody statute, including Colorado, Texas and Kansas.[5] The Colorado statute, for example, requires that any motion for joint custody be filed by both parties, Colo.Rev.Stat. § 14–10–124(5) (1973), and that any plan for joint custody must be jointly agreed to by the parties, Colo.Rev.Stat. § 14–10–124.5(5) (1973). In Colorado, a trial court ordered joint custody over the objection of the mother. The appellate court ruled that the award in the absence of agreement of the parties was an abuse of discretion. *In re Marriage of Posinoff*, 683 P.2d 377, 378 (Colo.Ct.App. 1984). *See also Gonzalez v. Gonzalez*, 672 S.W.2d 887 (Tex.Ct.App.1984) (court has no authority to award joint custody without agreement); *Larsen v. Larsen*, 5 Kan. App.2d 284, 615 P.2d 806 (1980) (without agreement, joint custody award unauthorized).

[2] We hold that the trial court abused its discretion by imposing the order of joint legal custody on the parents and child. The statute required parental agreement. Here, there was parental opposition. *See Lembach v. Cox*, 639 P.2d 197, 200 (Utah 1981) (inappropriate to order joint custody where parents not in agreement). Thus, we vacate the order of joint legal custody. Due to our ruling and remand, we need not reach Ms. Thronson's challenge to the provision for automatic change of custody when one parent moves from the state.

ANALYSIS OF CHILD CUSTODY UNDER § 30–3–10

Our vacating of the order of joint legal custody is not necessarily dispositive of the issues of child custody, including legal custody, i.e., decision-making, and physical custody, i.e., caregiving and visitation rights. The trial court's findings might support a "best interests" custody award under § 30–3–10, although an award of joint legal custody was improper. However, both the court's memorandum decision and formal findings specify the court's reliance on the legislature's list of best interest factors in the joint legal custody statute § 30–3–10.2(3) enumerated above. On the other hand, § 30–3–10 provides:

> In determining custody, the court *shall* consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.

Utah Code Ann. § 30–3–10 (1989) (emphasis added).

Our Supreme court has developed the best interest factors to be considered under this provision.

> We believe that the choice in competing child custody claims should instead be based on *function-related factors.* Prominent among these, though not exclusive, is the identity of the *primary caretaker* during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child and the identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy. Another important factor should be the stability of the environment provided by each parent.

Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986) (emphasis added). *See also Hutchison v. Hutchison*, 649 P.2d 38, 41 (Utah 1982); Rule 4–903(3) Utah Code of Jud.Ad-

5. Illinois, Massachusetts, Ohio, and Wisconsin have also adopted similar statutes. *Fam.Law* § 32.06[2] at n. 45.

min. (1989) (requiring custody evaluators to consider and respond to a list of factors).

[3] Our comparison of the two lists of factors reveals that they are not identical, although some similarities appear. Moreover, the context of the respective factors point the thrust of the trial court's inquiry in two different directions. As a result, the findings herein will not support an ultimate finding under § 30–3–10 that child custody should be placed with one parent or the other. Further, the findings contain internal disagreement. The memorandum decision states "the court desires the parties to arrange between themselves for reasonable and liberal visitation which they determine." To the same effect is formal finding number 61: "[i]t is in the best interests of the parties and their minor child to attempt to arrange between themselves reasonable and liberal visitation.... If the parties are unable to do so, the court will set a specific schedule." But, the court in formal finding number 65 took that promised privilege away from the parties stating—"[i]n light of an appropriate reasonable and liberal visitation schedule, it is reasonable that the parties' minor child will spend 57% of his time with plaintiff, who has primary physical custody, and 43% of his time with the defendant." The "57%" visitation award to the mother provides the basis for the "primary physical custody" statement. This was the only time the trial court mentioned physical custody. This specification of visitation time surreptitiously imposed an award of joint physical custody upon the parties without proper consideration of the best interest factors under § 30–3–10. We hold the findings to be inadequate to support any award of child custody because:

(1) The trial court utilized best interest factors related to joint legal custody § 30–3–10.2(3) and not the factors related to child custody § 30–3–10;

(2) The findings are in conflict as to the determination of visitation rights, i.e., by the court or the parents;

(3) The findings do not support any award of physical custody; and

(4) Custody was awarded on the basis of a court imposed visitation time allocation.

Our task is to act in the best interests of the child. We must vacate and remand the custody and visitation award. We do not remand simply for revision of the findings or with directions to modify the decree regarding these matters. During the interim, the facts regarding the parents and their child and their relationships might have been dramatically changed. Further, the joint legal custody statute has been substantially amended. The current factual and legal circumstances should be examined before this matter is finalized. Thus, we remand for further fact finding and a new legal determination, utilizing whatever procedures and hearings the trial court deems necessary—consistent with this opinion.

CHILD SUPPORT AWARD

[4] Child support will have to be reconsidered in connection with the above remand. Utah Code Ann. § 78–45–7.4 (Supp. 1990) reveals that the support obligation is intended to be a shared obligation of both parents. This obligation must be allocated in proportion to the parties' adjusted gross income pursuant to Utah Code Ann. § 78–45–7.5 to –7.7. Subsection 7.5 lists the items of income to be included in gross income. It also lists two items to be subtracted from gross income to calculate adjusted gross income: alimony previously ordered and paid and child support previously ordered. Neither of those items is applicable here. Thus, gross income is the same as adjusted gross income in this case. But, the trial court failed to include income from nonearned sources as required by § 78–45–7.5(1)(a). Moreover, the trial court averaged Mr. Thronson's earned income for several years rather than using "current earnings." Section 78–45–7.5(5)(b) indicates that current earnings are to be used. On remand, child support calculations should properly account for these items pursuant to the statutory requirements.

ALIMONY AWARD

The trial court awarded Ms. Thronson alimony of $800 per month for one year

Three factors must be considered by the trial court in making an alimony award:

1. the financial condition and needs of the party seeking alimony;
2. that party's ability to produce sufficient income for him or herself; and
3. the ability of the other party to provide support.

Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah Ct.App.1988) (citing *English v. English*, 565 P.2d 409, 410 (Utah 1977)).

"Failure to analyze the parties' circumstances in light of these three factors constitutes an abuse of discretion." *Id.* (citing *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986)). As long as the trial court exercises its discretion within the bounds and under the standards we have set and has supported its decision with adequate findings and conclusions, we will not disturb its rulings. *Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988).

[5] Here, the trial court considered each of the alimony factors and entered findings. Ms. Thronson's actual and necessary monthly living expenses were found to be $3,700. She presented a higher figure, but the court heard evidence challenging certain items and found them to be overstated. Ms. Thronson's current earning capacity, as a full-time pharmacist, was found to be $35,000 a year gross. This finding was based on competent evidence and represents the midpoint of an annual gross salary range of $31,000 to $39,000. The final factor, Mr. Thronson's ability to provide support, i.e., his earning capacity, was considered by the trial court. He submitted a thirteen-year summary of his income. The trial court used an average of the last eight years, after excluding some contingent fee income in three of those years. Thus, the court found Mr. Thronson's average gross income to be $71,376 annually. This calculation and finding was in error. Mr. Thronson's schedule showed his current gross earning capacity to be $94,476 annually. Nevertheless, we cannot say that an award of $800 per month in alimony is an abuse of discretion given the above factors and other financial circumstances of the parties. But, we do hold that the trial court abused its discretion in making the alimony non-permanent, i.e., for one year.

The trial court found that "an annual income of $35,000 should be imputed" to Ms. Thronson, i.e., she could earn that amount, assuming she was employed on a full-time basis. But, the court found her needs to be $3,700 per month, i.e., $44,400 annually. Accordingly, she is not capable of meeting her needs, she requires $9,400 annually to meet her needs, even when employed on a full-time basis. Thus, she will require the $800 per month ($9,600 annually) alimony for the forseeable future. Otherwise, she will face a substantial income shortfall compared to her needs. Further, the trial court found Mr. Thronson's actual and necessary monthly living expenses to be $4,300 per month, i.e., $51,600 annually. This leaves him with some discretionary income. These findings warrant an award of permanent alimony. The trial court abused its discretion in limiting the alimony award to one year. *Rasband v. Rasband*, 752 P.2d 1331, 1335 (Utah Ct.App.1988). We remand for modification of the alimony award to be permanent alimony of $800 per month.

OTHER FINANCIAL AND PROPERTY AWARDS

There is no fixed formula upon which to determine a division of property in a divorce action. The trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. *See Naranjo*, 751 P.2d at 1146. Ms. Thronson claims the trial court erred by failing to restore to her inheritance monies expended by her while the parties were separated prior to divorce; by failing to replace certain furniture removed by Mr. Thronson; and by failing to restore certain funds spent by Mr. Thronson after they separated. We have examined these items and find no abuse of trial court discretion. This court will not disturb a determination of financial and property interests unless it is clearly unjust or a clear abuse of discretion. *Rasband*, 752

P.2d at 1335. Thus, we affirm the rulings on these matters.

BENCH and GARFF, JJ., concur.

In the Matter of the ESTATE OF Aundrae HIGLEY, a minor.

UTAH DEPARTMENT OF SOCIAL SERVICES, Appellee,

v.

Dennis J. HIGLEY, conservator, Appellant.

No. 900236–CA.

Court of Appeals of Utah.

April 10, 1991.

After recipient of state medical assistance payments settled his claim against the insurer of the owner of the automobile which caused his accident, State brought action against recipient under the Medical Benefits Recovery Act to recover medical assistance payments provided for recipient. The Third District Court, Salt Lake County, David S. Young, J., entered summary judgment for State, and recipient appealed. The Court of Appeals, Jackson, J., held that: (1) 1989 amendments to the Act applied retroactively, and (2) because recipient settled the claim without state's consent. state was entitled to recover the medical assistance payments.

Affirmed.

1. Social Security and Public Welfare ⇐241

1989 amendment to Medical Benefits Recovery Act, which previously prohibited filing of claim without State consent and, as amended, included settlement, compromise, release, or waiver of claim as well, was not substantive, and thus, could be applied retroactively. U.C.A.1953, 26–19–7(1)(a).

2. Social Security and Public Welfare ⇐241

State was entitled to recover from recipients medical assistance payments advanced in his behalf, as recipient settled his claim with insurer without state's consent. U.C.A.1953, 26–19–7(1)(a).

3. Social Security and Public Welfare ⇐241

Because recipient of state medical assistance payments settled claim with insurer without state's consent, state was entitled to recover those medical assistance payments, even though insurer's written offer to settle for policy limits predated both recipient's application for State assistance and state's acceptance; recipient's *claim was not fully and legally settled until* several months after state became obligated. U.C.A.1953, 26–19–7(1)(a).

4. Social Security and Public Welfare ⇐241

Where recipient of state medical assistance payments had claim for recovery against insurer of owners and driver of automobile which caused recipient's injuries, and recipient pursued that claim without state's consent, state's claim against recipient under Medical Benefits Recovery Act included "any proceeds" payable by third party to extent of State medical assistance provided to him. U.C.A.1953, 26–19–5, 26–19–7(1)(a).

Victor Lawrence (argued), Salt Lake City, for appellant.

R. Paul Van Dam, State Atty. Gen., and Douglas W. Springmeyer, Asst. Atty. Gen. (argued), Salt Lake City, for appellee.

Before BENCH, JACKSON and RUSSON, JJ.

OPINION

JACKSON, Judge:

Appellant ("the conservator") appeals from a summary judgment based on the

we have recognized the practical fact that in deciding whether to return a particular verdict, a jury may take into account the real or imagined consequences of that verdict and should be given all verdict choices reasonably supported by the evidence. *See, e.g., Hansen*, 734 P.2d at 424; *Baker*, 671 P.2d at 156–57. Implicit in that line of cases is an assumption that the jury will have some understanding of the relative consequences of the verdicts available to it. When faced with a choice between verdicts of guilty and mentally ill or not guilty by reason of insanity, however, the jury can only guess at the consequences of one versus the other. Therefore, they should be given some guidance.

Hermona Jane MORTENSEN, Plaintiff and Appellee,

v.

Kay Sherman MORTENSEN, Defendant and Appellant.

No. 19328.

Supreme Court of Utah.

Aug. 16, 1988.

Husband appealed from order of the Fourth District Court, Utah County, J. Robert Bullock, J., dividing parties' property in divorce action. The Supreme Court, Howe, Associate C.J., held that: (1) trial court making "equitable" property division pursuant to divorce statute should generally award property acquired by one spouse by gift and inheritance during marriage to that spouse, and (2) awarding husband all of stock that he acquired from his parents during marriage, then dividing remaining property by giving two-thirds to wife and one-third to husband was not inequitable.

Affirmed.

Zimmerman, J., filed concurring opinion in which Durham, J., concurred.

1. Divorce ⇐252.3(3)

In Utah, trial court making "equitable" property division pursuant to divorce statute should generally award property acquired by one spouse by gift and inheritance during marriage, or property acquired in exchange thereof, to that spouse, together with any appreciation or enhancement of its value, unless other spouse has by his or her efforts or expense contributed to enhancement, maintenance, or protection of that property, thereby acquiring equitable interest in it, or property has been consumed or its identity lost through commingling or exchanges or when acquiring spouse has made gift of interest therein to other spouse. U.C.A.1953, 30–3–5.

2. Divorce ⇐252.3(1, 3)

Exception to rule awarding property acquired by one spouse by gift and inheritance during marriage to that spouse is where part of or all of gift and inheritance is awarded to nondonee or nonheir spouse in lieu of alimony; remaining property should be divided equitably between parties as in other divorce cases, but not necessarily with strict mathematical equality. U.C.A.1953, 30–3–5.

3. Divorce ⇐252.3(3)

In making equitable property division when one spouse has acquired property by gift and inheritance during marriage, donee or heir spouse should not lose benefits of his or her gift or inheritance by trial court's automatically or arbitrarily awarding other spouse equal amount of remaining property which was acquired by their joint efforts to offset gifts or inheritance; any significant disparity in division of remaining property should be based on equitable rational other than on sole fact that one spouse is awarded his or her gifts or inheritance. U.C.A.1953, 30–3–5.

4. Divorce ⇐240(2)

Fact that one spouse has inherited or donated property, particularly if it is income-producing, may properly be considered as eliminating or reducing need for

alimony by that spouse or his source of income for payment of child support or alimony, where awarded, by that spouse; such property might also be utilized to provide housing for minor children or utilized in other extraordinary situations where equity so demands. U.C.A.1953, 30–3–5.

5. Divorce ⇐252.3(1, 3)

Awarding husband all of stock that he acquired from his parents during marriage, then dividing remaining property by giving two-thirds to wife and one-third to husband, was not inequitable, even if value of stock awarded to husband was not considered; parties did not have equal earning power, and wife had waived all right to alimony. U.C.A.1953, 30–3–5.

Richard B. Johnson, Provo, for defendant and appellant.

Michael D. Esplin, Provo, for plaintiff and appellee.

HOWE, Associate Chief Justice:

This case presents for determination the question of what disposition should be made in a divorce decree of property given to one of the parties to the marriage by his or her family during the course of the marriage.

Plaintiff Hermona Jane Mortensen and defendant Kay Sherman Mortensen were married on June 18, 1959, when they were eighteen and nineteen years of age, respectively. Neither brought any substantial assets into the marriage. In 1969, defendant's parents, who owned a farm, organized a corporation to which they conveyed the farm. They issued 50 percent of the stock to themselves and the remaining 50 percent to their five children in equal shares. A certificate of stock bearing defendant's name alone was issued to him for his 10 percent of the outstanding shares. Plaintiff has had no involvement with the corporation except that she served as its secretary for six months, during which time she performed some nominal secretarial work.

Plaintiff brought this action for divorce. At the end of the trial, the court granted her a divorce, but suggested to counsel for both parties that they attempt to agree on a division of the property and on the amount of child support and alimony, if any. Counsel agreed to do so, but requested that the court first guide them by deciding whether the shares of stock given to defendant by his parents should be considered by them in their negotiation. The court took the question under advisement and, after reading trial memoranda provided by counsel, ruled that the stock "is property of the marriage and should be taken into consideration by the court in dividing all marital property on a fair and equitable basis." Thereafter, the parties stipulated to a division of their property which gave all of the shares of stock to defendant, but gave about two-thirds in value of the remaining property to plaintiff, including their major asset, their house and lot which had been fully paid for. They also stipulated to amounts of child support for the three minor children and that plaintiff should be awarded no alimony. The stipulation was made subject to the right of defendant to appeal to this Court the trial court's ruling quoted above concerning the shares of stock. The court accepted and approved the stipulation, which was incorporated into a decree of divorce.

Utah Code Ann. § 30–3–5 (1984, Supp. 1988) tersely provides: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties." "Property" is nowhere defined in our divorce code. In *Weaver v. Weaver*, 21 Utah 2d 166, 442 P.2d 928 (1968), we rejected the contention of the defendant husband that shares of stock which had been given to him by his father and sister should not have been treated by the trial court as part of the marital estate and divided between him and his plaintiff wife. We did so without any analysis of the issue and based our decision on the oft-repeated rule that under section 30–3–5, there is no fixed rule or formula for the division of property, the trial court has wide discretion in property division,

and its judgment will not be disturbed on appeal unless an abuse of discretion can be demonstrated. In that case, however, the wife was awarded no alimony and was directed to pay her own attorney fees and costs, even though she was totally disabled. More recently in *Bushell v. Bushell*, 649 P.2d 85 (Utah 1982), the defendant husband's father had given him fourteen acres of land during the marriage. In a divorce action brought by the plaintiff wife, we affirmed the trial court's division of property which awarded her one acre of that land upon which the parties placed a mobile home in which they lived. She was also given the right to use the remaining thirteen acres for farming and for her livestock for seven and one-half years to assist in providing support for the minor children and herself. Similarly, in *Dubois v. Dubois*, 29 Utah 2d 75, 504 P.2d 1380 (1973), we were unable to find any abuse of discretion in the division of a marital estate totalling $588,581 which awarded to the plaintiff wife 60 percent thereof, even though "the greater part of the nucleus of this estate was the result of investment and reinvestment of gifts from the plaintiff's relatives." The defendant husband had appealed the division because the trial court had not taken into consideration that the wife was a beneficiary of the estate of her uncle who died after the divorce action was filed but before trial. This Court made no specific comment on that issue and affirmed the property division but reversed the award of alimony made by the trial court, since the wife could maintain herself on the income from the property awarded her.

In contrast to the above cases, we have on a number of occasions affirmed a division of property made by the trial court which awarded to one spouse property which he or she inherited during the marriage. For example in *Preston v. Preston*, 646 P.2d 705, 706 (Utah 1982), we affirmed a divorce decree awarding to each party, in general, the real and personal property he or she brought to the marriage or inherited during the marriage. We there said:

> Following the principle we have approved in cases like *Georgedes v. Georgedes*, Utah, 627 P.2d 44 (1981); *Jesperson v. Jesperson*, Utah, 610 P.2d 326 (1980); and *Humphreys v. Humphreys*, Utah, 520 P.2d 193 (1974), the district court concluded that each party should, in general, receive the real and personal property he or she brought to the marriage or inherited during the marriage.

Again, in *Burke v. Burke*, 733 P.2d 133 (Utah 1987), the plaintiff wife, ten years into the marriage, inherited from her mother's estate three and one-half acres of unimproved land then worth less than $5,000. Although no improvements were made to the property nor any effort was expended by either party, the property had appreciated at the time of divorce to $35,000 per acre. The trial court awarded the property solely to the plaintiff wife, giving the defendant husband no part of the land's original value or appreciation during the marriage. This Court refused to disturb that award. A few months later, we decided *Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987), where the plaintiff invested in houses money she had inherited early in the marriage. During their twenty-year marriage, the parties owned three houses in succession. During the holding periods, each house appreciated in value. Upon divorce, the plaintiff wife was credited with the amount of her inheritances that went into the houses, but the parties equally shared the appreciation of the value of the houses. We found no abuse of discretion in that arrangement. See also *Argyle v. Argyle*, 688 P.2d 468 (Utah 1984), where the defendant husband was credited with the amount of a gift of land received from his mother during the marriage.

Some of the above cases in which gifts or inheritances received by one of the parties to the marriage were treated differently can be reconciled because of the effort made by the nondonee or nonheir spouse to preserve or augment the asset, *Dubois v. Dubois, supra*, or because of the lack of such effort, *Burke v. Burke, supra*. Also, in *Weaver v. Weaver, supra*, the award to the wife of part of the assets given to the husband during the marriage by his family was in lieu of alimony and attorney fees.

Significantly, no case has been found where this Court has reversed a trial court's disposition of gifts or inherited property received by one party during the marriage. In almost every case, we have emphasized the wide discretion trial courts have in property division and have refrained from laying down any general rules for the disposition of gifts and inherited property.

A review of the law in other jurisdictions discloses that generally property acquired by one spouse by gift or inheritance during the marriage is awarded wholly to that spouse upon divorce unless the other spouse has contributed to the augmentation, improvement, or operation of the property or has significantly cared for, protected, or preserved it, thereby acquiring an equitable interest in the property. In some states, this rule is aided by or based on statute. *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304 (1982); *Klingberg v. Klingberg*, 68 Ill.App.3d 513, 25 Ill.Dec. 246, 386 N.E.2d 517 (1979); *In re Marriage of Pitluck*, 616 S.W.2d 861 (Mo.Ct.App.1981); *In re Marriage of Herron*, 186 Mont. 396, 608 P.2d 97 (1980); *In the Matter of the Marriage of Pierson*, 294 Or. 117, 653 P.2d 1258 (1982); *Hussey v. Hussey*, 280 S.C. 418, 312 S.E.2d 267 (Ct.App.1984); *Wierman v. Wierman*, 130 Wis.2d 425, 387 N.W.2d 744 (1986). In other states, the rule is founded on case law holding that although trial courts have wide discretion in the division of property, which discretion will be disturbed on appeal only if it has been abused, as a general rule an equitable and fair distribution of property requires that gifts and inheritances be retained by the donee or heir spouse. *Raupp v. Raupp*, 3 Haw.App. 602, 653 P.2d 329 (1983); *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). In *Hussey v. Hussey, supra*, the court noted that a substantial majority of states exclude inherited property from the marital estate of the parties, citing Baxter, *Marital Property* § 41:8 (Supp.1983); *see now* Supp. 1987. It justified that policy on the ground that "property which comes to either party by avenues other than as a consequence of their mutual efforts owes nothing to the marriage and is not intended to be shared." *Hussey*, 312 S.E.2d at 270. The same court further observed:

> Finally, we are mindful that the inclusion of inherited property in the marital estate subjects it to being removed from the natural line of succession, thus thwarting the desire of the persons who acquired it and passed it on to the spouse in possession. At the same time, the spouse who made no contribution toward acquisition of the property benefits from the windfall award.

Hussey, 312 S.E.2d at 270.

The rule that property acquired by gift or inheritance by one spouse should be awarded to that spouse on divorce unless the other spouse has, by his or her efforts with regard to the property, acquired an equity in it does not apply when the property thus acquired is consumed, such as when a gift or an inheritance of money is used for family purposes, *In re Marriage of Metcalf*, 183 Mont. 266, 598 P.2d 1140 (1979); when the property completely loses its identity and is not traceable because it is commingled with other property (sometimes called transmuted), *Wierman v. Wierman, supra; Klingberg v. Klingberg, supra; Agent v. Agent*, 604 P.2d 862 (Okla. Ct.App.1979); or when the acquiring spouse places title in their joint names in such a manner as to evidence an intent to make it marital property. *Hussey v. Hussey, supra.* See also *Van Newkirk v. Van Newkirk, supra*, where the court determined that shares in a mutual fund were actually given to both husband and wife by the wife's parents.

Some jurisdictions which award property acquired by one spouse by gift or inheritance also award to him or her any appreciation of that property during marriage due to inflation. *Van Newkirk v. Van Newkirk, supra; In re Marriage of Komnick*, 84 Ill.2d 89, 49 Ill.Dec. 291, 417 N.E.2d 1305 (1981). Other jurisdictions do not always do so. *See Mochida v. Mochida*, 5 Haw.App. 348, 691 P.2d 771 (1984).

Once property acquired by gift or inheritance has been set over to the donee or heir spouse in accordance with the rules just

stated, the jurisdictions are in conflict as to how the nondonated and noninherited property (hereinafter called remaining property) should be divided. In *Van Newkirk v. Van Newkirk, supra,* the court held that the remaining property should be divided equitably between the parties apparently without regard to the fact that one party had been awarded his or her property acquired by gift or inheritance. (The court observed that generally the disparity in the division of the remaining property should not exceed two-thirds to one-third.) This view that the award to one spouse of his or her inheritances and gifts should not be a factor in the division of the remaining property was taken by two dissenting justices on the Oregon Supreme Court in *In the Matter of the Marriage of Pierson, supra.* Other courts, however, have taken the position that even though donated or inherited property is not subject to equitable division, it may properly be considered as a factor in determining what constitutes an equitable division of the remaining property. *Hussey v. Hussey, supra; In the Matter of the Marriage of Pierson, supra.* In the latter case, the remaining property was not evenly divided. The wife, who was awarded a farm she inherited during the marriage valued at over $100,000, received less than 50 percent of the remaining property in order to make the husband economically self-sufficient. The court observed:

> Where a decree cannot achieve all the objectives of a dissolution and at the same time divide property exactly evenly, the court should order a division of assets which is out of balance to the extent required for the accomplishment of the other purposes of the decree . . ., as here, to enable both parties to begin post-marital life with a degree of economic self-sufficiency. . . .

Pierson, 653 P.2d at 1262.

[1–4] We conclude that in Utah, trial courts making "equitable" property division pursuant to section 30–3–5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, *Dubois v. Dubois, supra,* or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. *Cf. Jesperson v. Jesperson,* 610 P.2d 326 (Utah 1980). An exception to this rule would be where part or all of the gift or inheritance is awarded to the nondonee or nonheir spouse in lieu of alimony as was done in *Weaver v. Weaver, supra.* The remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equality. *Teece v. Teece,* 715 P.2d 106 (Utah 1986). However, in making that division, the donee or heir spouse should not lose the benefit of his or her gift or inheritance by the trial court's automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to offset the gifts or inheritance. Any significant disparity in the division of the remaining property should be based on an equitable rationale other than on the sole fact that one spouse is awarded his or her gifts or inheritance. The fact that one spouse has inherited or donated property, particularly if it is income-producing, may properly be considered as eliminating or reducing the need for alimony by that spouse or as a source of income for the payment of child support or alimony (where awarded) by that spouse. Such property might also be utilized to provide housing for minor children or utilized in other extraordinary situations where equity so demands. These rules will preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property. It also accords with the normal intent of donors or deceased persons that their gifts and inheritances should be kept within their family

and succession should not be diverted because of divorce.

[5] Turning now to the instant case, based on the stipulation of the parties, defendant was awarded all of the stock. This was entirely proper since plaintiff does not claim that through any effort of hers, the value of the stock was in any way enhanced. Indeed, there was no evidence that the stock had appreciated in value. Defendant complains, however, that even though he was awarded the stock, because of the trial court's ruling that the stock "is property of the marriage and should be taken into consideration by the court in dividing all marital property on a fair and equitable basis," he was compelled to stipulate to a division of the remaining property which gave him less than he would have otherwise been entitled to. Defendant apparently assumes that had the trial court made the division of property, it would have, in view of its ruling stated above, given plaintiff an award of remaining property equal in amount to the value of the stock before giving defendant any of the remaining property.

We cannot agree with defendant's contention. We are not satisfied that by its ruling the trial court intended the meaning which defendant gives to it. In the first place, even though the stock should have been and was awarded to defendant, the trial court was technically correct in ruling that the stock was not without the purview of the court since it was "property" under Utah Code Ann. § 30–3–5. *Weaver v. Weaver, supra.* Secondly, the balance of the court's ruling is couched in general terms. leaving us without any way of knowing the extent of consideration the trial court in dividing the remaining property would have given to the fact that defendant was entitled to be awarded his stock. We cannot assume that the trial judge would have given improper consideration of, or too much weight to, that fact. Since the trial court did not actually make the division of property here but only accepted the division made by the parties themselves, we cannot presume that had the court made the division, it would have fallen into error.

We do point out that the division agreed upon by the parties would have been an equitable division had it been made by the trial court, even though it gave plaintiff approximately two-thirds of the property and defendant one-third, exclusive of the shares of stock. Thus, the trial court's vague ruling did not mislead defendant into stipulating to an inequitable division. Here, the parties married at a young age. The husband continued his education and finally obtained a Ph.D. degree in metallurgy. He teaches at a private university and earns a gross salary of approximately $2,560 per month. The parties have four children, one of whom had obtained his majority at the time of trial but was still living at home. After the birth of the last child, plaintiff went back to school and obtained a bachelor's degree with a teaching certificate. For five years prior to the trial, she had been employed as a public school teacher, earning approximately $1,300 gross per month. Despite the disparity in their educational achievement and their earnings, plaintiff waived all right to alimony and agreed to the payment of $150–per–month child support for each of the three minor children in her custody. Although there is scant evidence in the record concerning the extent of retirement benefits which the parties may later become entitled to, it would appear that defendant's retirement will be greater because of his higher salary and longer number of years in employment. Plaintiff was not awarded any part of defendant's retirement. In view of these factors, it would not have been inequitable for the trial court to award plaintiff two-thirds of the remaining property and defendant one-third, giving no weight at all to the fact that he received his shares of stock.

Defendant raises one further issue, that the decree signed by the trial court deviated from the oral stipulation the parties entered into the record. We find that the decree accurately reflected the intent of the parties, and the deviation from the exact language of the stipulation was of no consequence. In any event, the language

of the stipulation is not necessarily binding on the court. *Jackson v. Jackson*, 617 P.2d 338 (Utah 1980); *Klein v. Klein*, 544 P.2d 472 (Utah 1975); *Johnson v. Johnson*, 21 Utah 2d 23, 439 P.2d 843 (1968).

The decree of the trial court is affirmed.

HALL, C.J., and STEWART, J., concur.

ZIMMERMAN, Justice: (concurring).

I concur in the majority opinion, at least as I understand its scope. I write separately to explain that understanding. As I read the majority opinion, the rules articulated today require only that in the *usual* case not fitting within one of the exceptions spelled out by Justice Howe, property acquired by one spouse during the marriage through gift or inheritance should be awarded to that spouse upon divorce. I take this to be nothing more than a variation on the analogous rule applicable to property brought into the marriage by one party: in the usual case, that property is returned to that party at divorce, absent exigent circumstances. *Preston v. Preston*, 646 P.2d 705, 706 (Utah 1982). I certainly do not read the majority opinion as creating an exalted status for inherited or donated property that would effectively entail it or its value beyond the reach of a trial court fashioning a divorce decree.

The overarching general rule remains the same in any divorce case: to provide adequate support for the children of the marriage, *Race v. Race*, 740 P.2d 253, 256 (Utah 1987), and to divide the economic assets and income stream of the parties so as to permit both to maintain themselves after the marriage as nearly as possible at the standard of living enjoyed during the marriage. *See, e.g., Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988). That standard ultimately determines how property and income should be allocated by the trial court in making property division, alimony, and child support orders. Where possible, interests of parties in their separate property, such as those described by Justice Howe, should be honored. For this reason, the rules articulated today, like those generally applicable to separate pre-marital property, may limit somewhat the trial court's initial flexibility to allocate property of a marriage in a fashion so as to provide an entirely equitable portion to each party. But if, after an attempt is made to pay due deference to each party's claim to particular pieces of property by reason of their source, the court finds that it is unable to fashion a division of assets and awards of alimony and child support that will be just and equitable for both parties and the children, then it is free to ignore those claims in the greater interest in a just and equitable decree.

DURHAM, J., concurs in the concurring opinion of ZIMMERMAN, J.

STATE of Utah, By and Through the DIVISION OF CONSUMER PROTECTION, Jean A. Williams, Director, Plaintiff and Appellant,

v.

GAF CORPORATION, a Delaware corporation, Defendant and Appellee.

No. 19836.

Supreme Court of Utah.

Aug. 18, 1988.

State Division of Consumer Protection brought action against asphalt shingle manufacturer. The Third District Court, Salt Lake County, Bryant H. Croft, J., granted summary judgment for manufacturer, and appeal was taken. The Supreme Court, Stewart, J., held that: (1) Division could sue for damages to consumer based on complaint filed by consumer with Division, and (2) promotional materials provided by manufacturer to retailer, which were

Stewart v. State, 830 P.2d 306, 308 (Utah App.1992).

[16] As a prerequisite to an attack on findings of fact, the petitioner must marshal all evidence in support of the findings and demonstrate "that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings." *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989); *see West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App.1991) (discussing in detail what "onerous" marshaling burden entails for appellants). This marshaling requirement provides the appellate court the basis from which to conduct a meaningful and expedient review of facts challenged on appeal. *See Wright v. Westside Nursery*, 787 P.2d 508, 512 n. 2 (Utah App.1990).

[17] In the present case, petitioner does not meet his marshaling burden; rather, he merely reargues the evidence most favorable *to him, leaving it to this court to sort out* what evidence actually supports the habeas court's competency determination. Because he has failed to meet this burden, we decline to consider the merits of his argument on appeal. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991).[6]

CONCLUSION

The information known to the trial court at the time of the plea hearing does not indicate that the trial judge should have had a bona fide doubt with respect to petitioner's competency to plead guilty. Furthermore, we refuse to consider petitioner's claim that the trial court erred in finding him competent at the time he entered his guilty plea because he has failed to meet his burden to marshal the evidence. Nevertheless, there is an adequate evidentiary foundation for the habeas court's determination that petitioner was competent at the time he entered his guilty pleas. Accordingly, we affirm the trial court's denial of petitioner's habeas corpus petition.

DAVIS, J., and ORME, Associate P.J., concur.

6. However, our review of the record suggests the likelihood that sufficient evidence supports the habeas court's finding that petitioner was competent at the time he entered his guilty plea. Dr Carlisle testified that although petitioner probably suffered from MPD at the time of the shootings, he was nevertheless competent to have pled guilty He further testified that petitioner would have been able to think rationally, form a mental state of intent to kill, understand the nature of the proceedings and the nature of the crime, comprehend the reasons for punishment, and assist his attorney Dr Carlisle explained that petitioner "would have the rational thought of determining whether or not [pleading guilty] was the choice he wanted to make at the time" Dr Carlisle also testified that if the host personality had really been unaware of what the alternate *personality had done, he would have expected* more confusion and inability to remember in petitioner's statements at the police station and that it was possible petitioner was blocking his memory Furthermore, the trial court s findings and conclusions clearly indicate the court applied the appropriate legal standard in finding petitioner competent to plead guilty, as required by *Dusky v. United States*, 362 U S 402, 80 S Ct 788, 4 L.Ed.2d 824 (1960) (per curiam) and Utah Code Ann. § 77–15–2 (1993)

Christa C. SCHAUMBERG, Plaintiff and Appellee,

v.

***Thomas J. SCHAUMBERG, Defendant* and Appellant.**

No. 920865–CA.

Court of Appeals of Utah.

May 26, 1994.

Divorce action was brought. The Third District Court, Salt Lake County, Timothy R. Hanson, J., entered a final decree of divorce. Husband appealed. The Court of Appeals, Davis, J., held that: (1) trial court did not abuse its discretion in awarding wife $800 per month alimony; (2) finding that husband spent loan, a marital debt, to maintain and improve business building was not clearly

erroneous; (3) wife was entitled to one half of appreciation of building; and (4) remand was required for determination of whether wife was entitled to attorney fees on appeal and, if so, amount of fees.

Affirmed and remanded.

1. Divorce ⇐239, 240(1)

Trial court made adequate finding regarding wife's need and, thus, did not abuse its discretion in awarding wife $800 per month alimony; wife presented uncontroverted testimony regarding her projected needs and past standard of living and husband's ability to pay.

2. Divorce ⇐231

General purpose of alimony is to prevent receiving spouse from becoming a public charge and to maintain to the extent possible the standard of living enjoyed during marriage.

3. Divorce ⇐237

In determining whether to award alimony and in setting amount, trial court must consider financial conditions and needs of receiving spouse; ability of receiving spouse to provide for him or herself; and ability of payor spouse to provide support.

4. Divorce ⇐240(2)

When payor spouse's resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider recipient spouse's station in life.

5. Divorce ⇐286(3.1), 287

When trial court has failed to make findings on financial conditions and needs of receiving spouse, ability of receiving spouse to provide for him or herself, and ability of payor spouse to provide support, Court of Appeals reverses award of alimony unless pertinent facts in record are clear, uncontroverted, and capable of supporting only a finding in favor of judgment; so long as record is clear that trial court has considered these factors, Court of Appeals will not disturb trial court's determination regarding alimony unless trial court clearly abused its discretion.

6. Divorce ⇐286(2, 5)

Trial court has considerable discretion concerning property distribution in divorce proceedings; thus, its actions enjoy a presumption of validity.

7. Divorce ⇐252.3(3)

A trial court has discretion to award inherited property in divorce action.

8. Divorce ⇐286(8)

Court of Appeals disturbs distribution of property in divorce proceeding only when there is misunderstanding or misapplication of the law resulting in substantial and prejudicial error, evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest clear abuse of discretion.

9. Divorce ⇐252.3(3)

While trial court has discretion to award inherited property in divorce proceeding, the property, as well as its appreciated value, is generally regarded as separate from marital estate, and, hence, is left with receiving spouse in property division incident to divorce.

10. Divorce ⇐286(8)

In reviewing husband's claim that trial court clearly erred in finding that he spent a loan, admittedly a marital debt, to maintain and improve a business building, Court of Appeals had to give due regard to opportunity of trial court to judge credibility of witnesses, and Court would not set aside challenged finding except if it determined it to be clearly erroneous. Rules Civ.Proc., Rule 52(a).

11. Divorce ⇐278.1

To challenge finding on property division, party must marshal all evidence supporting challenged finding and demonstrate how marshaled evidence is insufficient to support finding.

12. Divorce ⇐253(2)

Trial court's finding that husband spent proceeds from a loan, a marital debt, to maintain and improve a business building was not clearly erroneous, for purposes of determining property division; husband did

not marshal evidence but merely reargued evidence supporting his position and husband caused inconsistencies in the record.

13. Divorce ⇐252.3(3)

There was no error in trial court's determination that wife was entitled to one-half of appreciation of business building pursuant to property division upon divorce; even though husband used inherited funds to pay down payment on building, he used substantial marital funds to maintain and augment that asset.

14. Divorce ⇐223, 226

Trial courts have discretion to award attorney fees in domestic cases so long as award is based on findings regarding need of receiving spouse, ability of payor spouse to pay, and reasonableness of fees. U.C.A.1953, 30–3–3.

15. Divorce ⇐287

When trial court has awarded attorney fees in divorce proceeding based upon findings regarding need of receiving spouse, ability of payor spouse to pay, and reasonableness of fees, and when receiving spouse has prevailed on appeal, Court of Appeals will award attorney fees on appeal and remand solely for trial court to make foregoing findings. U.C.A.1953, 30–3–3.

16. Divorce ⇐287

When Court of Appeals reverses partial award of attorney fees in divorce proceeding and remands for findings on attorney fees at trial, Court of Appeals likewise remands to determine attorney fees on appeal when party claiming fees on appeal substantially prevails. U.C.A.1953, 30–3–3.

17. Divorce ⇐287

When party who prevails on appeal in divorce action, yet was not awarded fees at trial, claims attorney fees on appeal solely on basis of new allegations of change in financial condition and those allegations are not a matter of record and have not been adjudicated by finder of fact, Court of Appeals cannot evaluate claim; prevailing party's claim for attorney fees on appeal based on allegation of need must be addressed by trial court to determine need of claiming spouse, ability of other spouse to pay, reasonableness of fees and amount, if any, to be paid. U.C.A.1953, 30–3–3, 78–2a–3.

Frederick N. Green and Susan C. Bradford, Salt Lake City, for appellant.

Kent T. Yano, Salt Lake City, for appellee.

Before DAVIS, GREENWOOD and JACKSON, JJ.

OPINION

DAVIS, Judge:

Appellant, Thomas J. Schaumberg (Husband), appeals from a final decree of divorce from appellee, Christa C. Schaumberg (Wife). We affirm and remand for determination of whether Wife is entitled to attorney fees on appeal.

FACTS

At the time of their divorce, the parties had been married for over twenty-five years. and their two children had reached their majority.

For sixteen years of the marriage, Husband was employed by the military. Thereafter, he became self-employed as a financial consultant through a solely-owned corporate entity.

During the marriage, Husband inherited real property from his father's estate, the sale of which resulted in net proceeds of $33,933.87. Husband used $20,000 of these funds as a down payment on a business building. The court found that Husband spent an additional $8000 of the inherited funds to improve the building. Husband's corporation, the sole tenant of the building, paid Husband $1250 a month in rent. Husband used these funds to pay the $957 monthly mortgage payment on the property and used the remainder for upkeep.

Over the years, Husband maintained and improved the business property using corporate and other funds. Prior to trial, Husband responded to an interrogatory to the effect that he used the proceeds of a $25,000 loan (the Armstrong loan) to improve the

building. However at trial, Husband suggested that he spent the proceeds of the Armstrong loan on family expenses. The trial court found in its memorandum decision that the Armstrong loan was used in part to maintain and upgrade the building. At the time of trial, the outstanding mortgage on the building amounted to approximately $45,000, and the fair market value was $100,000, leaving an equity of $55,000.

The court awarded Wife $800 per month alimony. While the court made no findings regarding need, Wife submitted the following to establish her need and standard of living: (1) at the time of filing, in September 1991, she declared $3178 as her monthly living expenses; (2) at pretrial, she declared $2849 as her monthly living expenses; and (3) at trial, she submitted an exhibit projecting her monthly living expenses as $2272.58. Wife testified that the three amounts differed because of her changing understanding of her finances and her changing circumstances as she moved from a family household to a single household. She also testified that the last amount most nearly reflected her understanding of her projected needs and standard of living in a single household.

Taking into account her skills and past experience, the court imputed to Wife an earning ability of $1000, and awarded her a portion of Husband's military retainer amounting to $589 per month. These amounts, combined with Wife's alimony award, amounted to a gross monthly income of $2389.

At trial, Wife made no claim against Husband's original $28,000 investment in the business property. However, she claimed one-half of the equity in excess of Husband's investment in the building. The court agreed with this claim, determining Wife was "entitled to share in the appreciation in the value of the building in an amount equal to $27,000, which takes into account [Husband's] initial separate property contribution." The court based this determination on the fact that "the rent paid by Husband's corporation exceeded the mortgage payment, [and that] Husband sought to categorize the $25,000 Armstrong debt as a marital debt and he used the funds from the loan to improve the property."

On the last day of trial, the parties closed on the sale of their marital house, the proceeds of which the court had not yet distributed. At trial, counsel for Wife claimed that she feared Husband would keep all the money if the title company issued only one check in both parties' names. Wife's counsel suggested that the title company issue checks to each party for one-half of the sale proceeds, pending the trial court's final distribution of marital assets. Husband's counsel informally stipulated to that procedure.

Later, in its memorandum decision and in its conclusions of law, the court awarded Wife the entire net proceeds of the sale of the house, which amount the court determined to be $61,730. Both parties agree that Husband received one-half of the proceeds but did not deliver those proceeds to Wife.

In making its property distribution, together with allocation of the Armstrong debt, the court determined that each of the parties' distributions were equal within a few hundred dollars.

The court also found that each party should pay their respective attorney fees. The court based this determination in part upon its findings that Wife received a greater share of the liquid assets, that the parties received a relatively equal distribution of the marital assets, that the court had partially resolved inequities in the parties' income via alimony, and that Husband voluntarily agreed to finance their daughter's education.

Husband appeals and Wife seeks attorney fees on appeal.

ALIMONY

[1] Husband claims the trial court abused its discretion in awarding Wife $800 per month alimony because it failed to make a finding regarding Wife's need.

[2] The general purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain to the extent possible the standard of living enjoyed during the marriage. *Howell v. Howell*, 806

P.2d 1209, 1212 (Utah App.), *cert. denied*, 817 P.2d 327 (Utah 1991).

[3, 4] In determining whether to award alimony and in setting the amount, the trial court must consider (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to provide for him or herself; and (3) the ability of the payor spouse to provide support. *Chambers v. Chambers*, 840 P.2d 841, 843 (Utah App. 1992). When "the payor spouse's resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider the recipient spouse's 'station in life.'" *Howell*, 806 P.2d at 1212; *accord Martinez v. Martinez*, 818 P.2d 538, 542 (Utah 1991).

[5] When the trial court has failed to make findings on the three factors listed above, we reverse, unless pertinent facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah App.1993); *Howell*, 806 P.2d at 1213. So long as the record is clear that the trial court has considered these three factors, we will not disturb its determination regarding alimony unless it has clearly abused its discretion. *Chambers*, 840 P.2d at 843.

We find no merit in Husband's claim that the evidence of need is controverted. Wife submitted documents reflecting her changing circumstances as she moved from a family household to a single household. In addition, she testified at trial that her stated needs amounted to $2272.58 per month. While Husband's counsel vigorously cross-examined her on this issue, Husband offered no evidence controverting her evidence of this amount.

Here, the court awarded Wife $800 per month alimony, imputed an earning ability of $1000 per month and awarded her a portion of Husband's military retainer amounting to $589 per month. Thus, the court's award contemplated that Wife would receive a monthly income of $2389. That figure is close to Wife's stated monthly need of $2272.58. In view of the trial court's equitable distribution of the marital assets and debts, Wife's uncontroverted testimony regarding her projected needs and past standard of living, and Husband's ability to pay, we conclude that the court considered the necessary factors. Accordingly, the court did not abuse its discretion in awarding her $800 per month alimony.

APPRECIATION

Husband claims the court erred in awarding Wife one-half of the appreciated value of his business property.

[6–8] A trial court has considerable discretion concerning property distribution in a divorce proceeding, thus its actions enjoy a presumption of validity. *Watson v. Watson*, 837 P.2d 1, 5 (Utah App.1992). In fact, a trial court has discretion to award inherited property. *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988). We disturb such a distribution of property only when there is "a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Id.*

[9] While a trial court has discretion to award inherited property, such property, "as well as its appreciated value, is generally regarded as separate from the marital estate and hence is left with the receiving spouse in a property division incident to divorce." *Burt v. Burt*, 799 P.2d 1166, 1169 (Utah App.1990); *accord Hall v. Hall*, 858 P.2d 1018, 1022 (Utah App.1993). Courts have considered inherited property as part of the marital estate when "the other spouse has by his or her efforts augmented, maintained, or protected the inherited or donated property, when the parties have inextricably commingled the property with marital property so that it has lost its separate character, or when the recipient spouse has contributed all or part of the property to the marital estate." *Id.* However, even in cases when the inherited property has not lost its identity as such, the court may nevertheless award it to the non-heir spouse in lieu of alimony and in other extraordinary situations when equity so demands. *Id.*

[10] Husband claims the court clearly erred in finding that he spent the $25,000 Armstrong loan, admittedly a marital debt, to maintain and improve the business building. He essentially argues that the business building is not marital property because he never used marital funds to augment or maintain it. Husband's argument challenges the court's findings of fact. In reviewing such a claim, we give due regard "to the opportunity of the trial court to judge the credibility of the witnesses," and we do not set aside a challenged finding except when we determine it to be clearly erroneous. Utah R.Civ.P. 52(a).

[11, 12] Moreover, to challenge a finding, the party must marshal all evidence supporting the challenged finding and demonstrate how the marshaled evidence is insufficient to support the finding. *Baker v. Baker*, 866 P.2d 540, 543 (Utah App.1993). Here Husband has not marshaled the evidence, but has merely reargued the evidence supporting his position.

Further, Husband caused the inconsistencies in the record. Husband prepared an answer to Wife's interrogatory to the effect that he spent the loan funds to improve the business property. However at trial, he denied this and said he spent the funds on family expenses. We therefore defer to the trial court, which was in a superior position to judge the credibility of the witnesses and to weigh the evidence. Thus, Husband has failed to demonstrate that the trial court's finding that he spent the proceeds from the Armstrong loan to maintain and improve the building is clearly erroneous.

[13] Even though Husband used inherited funds to pay the down payment on the building, he used substantial marital funds to maintain and augment that asset.[1] We find no error in the court's determination that the appreciated portion of the asset changed its character from a personal asset to a marital asset. *See Burt*, 799 P.2d at 1169. Likewise, we find no error in the court's determination that Wife was entitled to one-half of the appreciation of the building.

APPROVED STIPULATION

Husband claims the trial court erred in awarding Wife the entire equity from the sale of the marital property. He claims the parties stipulated that each party would receive one-half of the net proceeds of the sale and that the court approved that stipulation. Both parties agree that Husband has failed to deliver to Wife the money he received from the title company representing one-half of the proceeds.

At trial, Wife's counsel claimed Wife feared Husband would keep all the money if the title company issued only one check in both parties' names. Wife's counsel suggested that the title company issue checks to each party for one-half of the sale proceeds, pending the trial court's final distribution of marital assets. The parties never agreed that Husband could keep the funds notwithstanding a later court order.

Moreover, the court determined that Wife should receive all the net proceeds from the sale of the marital home. The court made this determination while aware that it had earlier approved the parties' agreement for temporary distribution of the sale proceeds. We therefore affirm the trial court's determination that Wife should receive all the proceeds from the sale of the marital home.

ATTORNEY FEES ON APPEAL

Based upon the foregoing, we hold that Wife has substantially prevailed on appeal. Notwithstanding the fact that she was not awarded attorney fees at trial, Wife asks this court to award attorney fees on appeal on the basis of allegations in her brief that her financial circumstances have changed since the time of trial.

1. No evidence in the record suggests that Husband's corporation paid an excessive amount for rent (which funds in turn were used to pay the mortgage). Our affirmance of the court's distribution of the building's appreciation does not turn on the fact that Husband's corporation was the sole tenant of the building. Nor do we suggest that payment of a legitimate business expense related to the value or use of an inherited asset converts that asset or a portion of that asset into a marital asset.

[14] Utah Code Ann. § 30–3–3 (Supp. 1993) grants courts discretion to award attorney fees in domestic cases. Trial courts have discretion to award fees, so long as the award is based on findings regarding the need of the receiving spouse, the ability of the payor spouse to pay and the reasonableness of the fees. *See Wells v. Wells*, 235 Utah Adv.Rep. 43, 45 (Utah App.1994).

[15] When a trial court has awarded fees at trial based on such findings, and when the receiving spouse has prevailed on appeal, we will award attorney fees on appeal and remand solely for the trial court to make the foregoing findings. *See, e.g., Hall v. Hall*, 858 P.2d 1018, 1027 (Utah App.1993); *Allred v. Allred*, 835 P.2d 974, 979 (Utah App.1992); *Lyngle v. Lyngle*, 831 P.2d 1027, 1031 (Utah App.1992); *Bell v. Bell*, 810 P.2d 489, 494 (Utah App.1991); *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah App.1991); *Haumont v. Haumont*, 793 P.2d 421, 427 (Utah App.1990).

[16] Similarly, when we reverse a partial award of attorney fees and remand for findings on attorney fees at trial, we likewise remand to determine attorney fees on appeal when the party claiming fees on appeal substantially prevails. *See, e.g., Potter v. Potter*, 845 P.2d 272, 275 (Utah App.1993); *Willey v. Willey*, 866 P.2d 547, 556 (Utah App.1993); *Muir v. Muir*, 841 P.2d 736, 742 (Utah App. 1992).

[17] When a party who prevails on appeal, yet was not awarded fees at trial, claims attorney fees on appeal solely on the basis of new allegations of a change in financial condition, and when those allegations are not a matter of record and have not been adjudicated by a finder of fact we cannot evaluate that claim. *Heltman v. Heltman*, 29 Utah 2d 444, 511 P.2d 720, 721 (1973); *see generally*, Utah Code Ann. § 78–2a–3 (Supp.1993) (regarding appellate court jurisdiction). A prevailing party's claim for attorney fees on appeal based on an allegation of need must be addressed by the trial court to determine the need of the claiming spouse, the ability of the other spouse to pay, the reasonableness of the fees and the amount, if any, to be paid. We therefore remand this claim for determination of whether Wife is entitled to attorney fees on appeal, and if so, the amount of fees to be awarded.

Affirmed and remanded.

GREENWOOD and JACKSON, JJ., concur.

STATE of Utah, Plaintiff and Appellee,

v.

Michael Wayne PILLING, Defendant and Appellant.

No. 930577–CA.

Court of Appeals of Utah.

May 27, 1994.

Defendant was convicted in the Seventh District Court, Carbon County, Bryce K. Bryner, J., of assault by prisoner, and he appealed. The Court of Appeals, Billings, P.J., held that: (1) defendant did not preserve for appeal contention that he was not a prisoner at the time of the assault; (2) defendant did not marshal the evidence as required to challenge sufficiency of the evidence; and (3) evidence demonstrated that defendant was a prisoner at the time of the assault and sustained the conviction.

Affirmed.

1. Criminal Law ⇐1030(3)

Defendant who did not argue at trial that he was not a prisoner because he was not in custody at time of assault failed to preserve the issue therefore precluding the court's consideration of the issue on appeal. U.C.A.1953, 76–5–102.5.

2. Criminal Law ⇐1030(3)

Any error in convicting defendant of assault by prisoner could not have been obvi-

other is a nullity." 86 Ill.Dec. at 746, 475 N.E.2d at 1125 (citing *Culver v. Title Guar. & Trust Co.*, 269 A.D. 627, 58 N.Y.S.2d 116 (1945)).

In the instant case, the revocation language of the trust agreement speaks only in the plural. The specific terms, "we reserve unto ourselves" are identical to the terms the *Khan* court construed. Additionally, the trust states "disposition by *us* ... of the property ... shall constitute ... revocation." (Emphasis added.) A literal reading of these terms mandates a finding that the co-trustors must mutually exercise the power to revoke the trust. Therefore, Herschel West as the surviving trustor/trustee could not unilaterally revoke the trust after the death of his co-trustor/trustee, and his quitclaim deed to himself and appellee was a nullity. Accordingly, we conclude the trial court's grant of summary judgment, determining Herschel West had authority to unilaterally transfer the trust property, was incorrect. The joint trust, as the court originally held, has title to the home transferred out of trust by Herschel West.

CONCLUSION

We hold that under the terms of the trust agreement, the power to revoke was reserved in Herschel and Hazel West as co-trustors. Additionally, the trust terms require joint action to revoke the trust. Accordingly, the surviving trustor could not unilaterally revoke the trust after the death of the other co-trustor. We therefore reverse the trial court's grant of summary judgment and remand for the entry of an order restoring the property to the joint trust and for such further proceedings the trial court determines are necessary.

ORME, P.J., and BENCH, J., concur.

Sahndra K. MARSHALL, Plaintiff and Appellee,

v.

Donald R. MARSHALL, Defendant and Appellant.

No. 950172-CA.

Court of Appeals of Utah.

April 11, 1996.

Wife brought divorce proceeding. The Fourth District Court, Utah County, Ray M. Harding, J., entered default judgment against husband striking his pleadings, and subsequently granted divorce decree. Husband appealed. The Court of Appeals, Davis, Associate P.J., held that: (1) default judgment was proper on basis of husband's noncompliance with discovery orders; (2) trial court made inadequate findings with respect to alimony award; (3) husband did not properly marshal evidence to challenge findings on value of marital estate; and (4) trial court's findings and conclusions regarding attorney fees were insufficient to allow meaningful review of award of such fees to wife.

Affirmed in part, reversed in part, and remanded.

1. Motions ⇐56(2)

"Nunc pro tunc order" is used to correct the court's omission or error; however, such an order may not be used to address an issue not previously before the court.

See publication Words and Phrases for other judicial constructions and definitions.

2. Divorce ⇐181

Court of Appeals did not address propriety of bench warrant for husband's arrest ordered at conclusion of divorce proceeding, though husband stated in "Statement of the Case" section of brief that the issue was on appeal, where issue was not mentioned anywhere else in brief.

3. Divorce ⇐85, 160

Trial court did not abuse discretion in entering default judgment against husband

and striking his pleadings in divorce proceeding, even if default was partially based on improper ground of husband's failure to pay support arrearages; default was supported on basis of noncompliance with discovery orders, where husband secreted approximately $180,000 in income while insisting to court that he had insufficient income to pay an additional $1,000 in support, where he never presented required statements proving tax payments which allegedly accounted for his lack of funds, and where he failed to provide documentation of several savings and investment accounts. Rules Civ.Proc., Rule 37(b)(2)(C).

4. **Appeal and Error** ⇐961
Pretrial Procedure ⇐44.1

Trial court has broad discretion to impose discovery sanctions upon a noncomplying party, and Court of Appeals will not reverse trial judge's decision to impose such sanctions absent an abuse of that discretion.

5. **Pretrial Procedure** ⇐44.1

Discovery sanctions are intended to deter misconduct and require a showing of willfulness, bad faith, or fault.

6. **Pretrial Procedure** ⇐44.1, 46

Striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential discovery sanctions that can be imposed upon a nonresponding party; because of severity of this type of sanction, trial court's range of discretion is more narrow than when the court is imposing less severe sanctions.

7. **Divorce** ⇐85

Judicial system is not to be manipulated in divorce proceedings by one who actively and aggressively misleads the court and the opposing party.

8. **Divorce** ⇐287

Remand of alimony award for findings on each of the required factors was necessary, where Court of Appeals could not determine the basis of the award or whether trial court abused its discretion in the amount of the award.

9. **Divorce** ⇐286(3.1)

Court of Appeals will not disturb alimony award absent a clear and prejudicial abuse of the considerable discretion granted the trial court in determining award.

10. **Divorce** ⇐235, 237, 238

With respect to alimony award in divorce proceeding, trial court must consider the financial conditions and needs of the receiving spouse, the ability of receiving spouse to produce a sufficient income, and the ability of supporting spouse to provide support; failure to consider those factors is abuse of discretion.

11. **Divorce** ⇐243, 286(9)

In awarding alimony in divorce proceeding, trial court must make sufficiently detailed findings on each of the three prescribed factors to enable reviewing court to ensure that trial court's discretionary determination was rationally based upon those factors; if sufficient findings are not made, reviewing court must reverse unless the record is clear and uncontroverted so as to allow court to apply the factors as a matter of law.

12. **Divorce** ⇐278.1

Ex-husband did not properly marshal all evidence in support of trial court's findings regarding value of marital property and then demonstrate insufficiency of evidence to support findings, as required when challenging those findings on appeal, where he merely recited the findings on point and then highlighted the evidence which he deemed contrary to the findings.

13. **Appeal and Error** ⇐757(3)

In order to challenge trial court's findings of facts on appeal, challenger must marshal all the evidence in support of the findings and then demonstrate that the evidence is insufficient to support those findings; Court of Appeals will uphold trial court's findings of fact if appellant fails to appropriately marshal all of the evidence.

14. **Divorce** ⇐253(3)

Where one party in divorce proceeding has dissipated an asset, hidden its value, or otherwise acted obstructively, trial court may, under its broad discretion, value the

property at an earlier date, i.e., date of separation.

15. Divorce ⇐85, 253(3)

Trial court acted well within its discretion at divorce proceeding in valuing marital property at time of parties' separation, as opposed to valuing the property at the time of trial, where husband failed to give accurate, verifiable accountings of his income and assets.

16. Divorce ⇐221, 287

Trial court's findings and conclusions with respect to award of attorney fees to wife in divorce proceeding were insufficient to allow a meaningful review of trial court's ruling, though trial court found wife's attorney fees were "necessary," where it made no finding regarding wife's need for such fees, and where it also awarded substantial marital assets to wife. U.C.A.1953, 30–3–3.

17. Divorce ⇐226, 286(9)

Decision to award attorney fees in divorce action must be based upon evidence of the financial need of the receiving spouse, the ability of other spouse to pay, and the reasonableness of the requested fees; failure to consider any of those factors is grounds for reversal on fee issue. U.C.A.1953, 30–3–3.

18. Divorce ⇐287

Wife who prevailed on central issue of husband's appeal of divorce judgment would be awarded attorney fees incurred as result of appeal if trial court determined on remand, following consideration of the three required factors, that she was entitled to attorney fees for trial-level proceedings.

19. Divorce ⇐194

Generally, when fees in divorce case are granted to prevailing party at trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal.

20. Divorce ⇐312.7

District court was required on remand to incorporate into divorce decree the juvenile court's order regarding custody and visitation, where district court had certified those issues to juvenile court, where parties subsequently entered into stipulation on those issues which was approved by juvenile court, and where juvenile court order provided that it would be incorporated into divorce decree and would be binding on the parties as though entered in district court. U.C.A. 1953, 78–3a–17.

21. Divorce ⇐287

Court of Appeals declined to discuss husband's claim that child support awarded at divorce proceeding was incorrect, where trial court was found not to have deviated from child support guidelines. U.C.A.1953, 78–45–7.12.

22. Divorce ⇐181

Court of Appeals rejected husband's request that trial judge in divorce proceeding be recused from case where husband failed to brief issue on appeal.

Fourth District, Utah County; The Honorable Ray M. Harding.

Helen E. Christian, Gustin & Christian, Salt Lake City, for Appellant.

Samuel King and David J. Friel, King, Friel & Colton, Salt Lake City, for Appellee.

Before DAVIS, Associate P.J., and GREENWOOD and JACKSON, JJ.

OPINION

DAVIS, Associate Presiding Judge:

Donald R. Marshall appeals from a final decree of divorce and related matters. We affirm in part and reverse in part.

PROCEDURAL BACKGROUND

In June of 1992, plaintiff filed for divorce. An order to show cause was obtained by plaintiff which, in pertinent part, addressed temporary alimony and child support. A hearing was held on the matter September 1, 1992. Defendant did not attend the hearing and, although aware of the hearing date, defendant's counsel was not present because of a scheduling conflict. In defendant's absence, the court entered an order which required that he pay $4122 per month in child support and $3500 per month in alimony.

Defendant objected to this order and requested a rehearing on the issues. The trial court granted defendant's request, and another hearing was held on October 7, 1992. This second hearing resulted in a reduction of the child support to $3000 per month,[1] but the alimony remained at $3500. The support payments were retroactive to August 1992. Both parties were also ordered to refrain from disbursing, disposing of, or encumbering any assets without the consent of the other.

Shortly thereafter, on December 4, 1992, plaintiff obtained an order to show cause regarding defendant's contempt for his failure to pay the full amount of the court-ordered support. Defendant paid plaintiff only $5500 per month, instead of the required $6500. In response, defendant filed a verified motion for relief requesting, among other things, that the alimony be reduced from $3500 to $1500, retroactive to August 1992. A hearing on those matters was held January 26, 1993. On February 1, 1993, the trial court, by memorandum decision, found there was sufficient evidence to sustain the temporary alimony award and also found defendant in contempt for his failure to pay the additional $1000 per month. Defendant subsequently filed a motion for reconsideration or, in the alternative, a motion to set aside the order, arguing the contempt order should be reversed and the amount of alimony reduced. On April 5, 1993, by memorandum decision,[2] the court partially granted defendant's motion and vacated the finding of contempt. However, the court again upheld the alimony amount and awarded judgment to plaintiff in the amount of $6000, reflecting the amount of the support arrearages.

Because there had been allegations of abuse, the issues of child custody and visitation were certified by the district court to the juvenile court on May 19, 1993. The parties subsequently entered into a stipulation regarding custody and visitation, which was approved by the juvenile court on November 16, 1993. The custody and visitation order provided, among other things, that plaintiff and defendant were to have joint legal custody of the children. The order also provided that it shall be "incorporated into the terms of the decree of divorce, and shall be binding on the parties to the divorce action as though entered in the District Court, in accordance with *Utah Code Ann.* § 78–3a–17." The case was then sent back to the district court for resolution of the other pending issues.

On March 10, 1994, plaintiff filed a "Motion for Order to Show Cause," [3] which was based upon several grounds, including defendant's failure to comply with discovery, his failure to pay the additional $1000 per month in support, and his concealment of assets. Plaintiff's memorandum in support of her motion alleged numerous occasions on which defendant had failed to comply with discovery. Plaintiff requested "that defendant be ordered, within 30 days, to completely comply with all discovery requests," that defendant be defaulted, and that he be found in contempt of court for his failure to pay the court-ordered support payments. Defendant responded by denying plaintiff's allegations and requesting immediate relief from the $3500 per month alimony award.[4] After a hearing, the trial court entered an order on May 27, 1994, which provided in part:

> 6. Both parties are to provide statements of any and all assets sold, transferred, hypothecated or otherwise handled or disposed of from the time the divorce was filed up to the present time. The accounting should be done strictly within the normal accounting procedures, and all foundation and background documents must be

1. Defendant had argued, however, that the child support be reduced to $2000.

2. The record does not reflect that a hearing was held on defendant's motion for reconsideration or that an order was prepared and signed subsequent to the memorandum decision.

3. Although plaintiff titles the "motion" an "order to show cause," an order to show cause was never signed by the trial court and it was treated as a motion. This was also the case in subsequent "motions for an order to show cause."

4. Each time defendant requested a reduction in the alimony amount, he claimed he did not have the income to pay the court-ordered amount.

provided to show the amounts of the sale, to whom, the distribution of those funds upon receipt and where they are presently located. No further assets are to be sold or transferred from this point on.

7. Defendant is to submit statements of all accounts in which defendant has an interest. Plaintiff asserts she needs discovery of more accounts than defendant has submitted....

....

9. All financial records from each party are to be submitted to the other by May 20, 1994, which should include credit card records, bank statements, canceled checks, etc.

The court also denied defendant's request to lower the alimony award and granted plaintiff a judgment against defendant in the amount of $21,955[5] for defendant's support arrearages.

In June of 1994, plaintiff began garnishing defendant's wages in an attempt to collect the judgment. Interrogatories were sent to defendant's employer, Prudential Securities. As a result of Prudential's answers to the interrogatories, plaintiff discovered that although defendant had earlier disclosed that he had a certain "Command Account" with Prudential, he had failed to reveal that he also had three others. Furthermore, while defendant testified at his deposition that he did not have any stocks with Prudential, Prudential's interrogatory answers revealed that he held "five groups of stock having a face value of $58,000."

When plaintiff began garnishing defendant's wages, defendant made a partial payment in July 1994, but then stopped making the monthly $5500 payment.[6] Thus, on August 19, 1994, plaintiff filed yet another motion for an order to show cause, seeking another judgment for the support arrearages and an order of contempt for defendant's failure to comply with the support order, his failure to comply with the May 27, 1994 discovery order, and his intentional withholding of information regarding his accounts with Prudential.

On September 9, 1994, before the August 19 motion for an order to show cause was heard, plaintiff filed a motion for "(1) Default on Defendant and/or (2) Obtaining Legal Fees to Continue Discovery and (3) Contempt." Plaintiff requested that defendant be defaulted for his continued failure to comply with discovery or, in the alternative, an order compelling defendant to pay plaintiff $25,000 so that she could complete discovery. Plaintiff also requested that defendant be found in contempt for defying the orders of the court. In plaintiff's supporting memoranda, thirteen instances of defendant's failure to provide discovery documents were specifically outlined. Plaintiff also illustrated how defendant had failed to comply with the court's discovery orders.

Defendant responded to plaintiff's motions on September 23, 1994. Accompanying defendant's response was "Defendant's Verified Statement in Re: Expenses Paid With Defendant's 1994 Year-To-Date Income." This document revealed that defendant had diverted $95,479.49 of his income in 1992 and $84,077.74 in 1993 without the knowledge of plaintiff or the court. This information suggested that he did have sufficient income to cover the additional $1000 per month he had failed to pay since August 1, 1992.

Plaintiff's August 19 and September 9 motions were heard on September 27, 1994. Plaintiff was present with her counsel and defendant's counsel was present. The court heard arguments of counsel; the record does not reflect the introduction of any evidence.

As a result of the September 27, 1994 hearing, the trial court entered an order on November 1, 1994. This order provided that plaintiff be given a $20,000 judgment for the support delinquencies for April 1994 through September 1994. Paragraph three of the order provided that because plaintiff "needs her delinquencies paid in order to fund nec-

5. This amount included the prior $6000 in arrearages which had been reduced to judgment on April 5, 1993 and $955 interest thereon.

6. Defendant's justification for this was that the garnishment was in lieu of support payments.

essary trial preparation, Defendant is ordered to pay his delinquencies in full, $41,349.71, by November 15, 1994, or he will be defaulted." Defendant objected to the order, arguing it was improper for the court to enter an order forcing defendant to pay support arrearages or his default would be entered. The court overruled defendant's objection.

As a result of defendant's failure to comply with the court's November 1, 1994 order, the court entered an Order of Default on November 30, 1994. The Order of Default provided, in pertinent part:

> In this action the Defendant ... having been served through his counsel ... on September 27, 1994, with the Plaintiff's Proposed Order on Order to Show Cause and on Plaintiff's Motion to Default and Defendant's Counterclaim to Reduce Support, and said Order having been entered by the Court November 1, 1994, ... and having not complied with paragraph 3 of said Order, now therefore pursuant to the terms of that Order, the Default of said Defendant in the premises is hereby duly entered according to law.

Defendant filed a motion to set aside the default on December 6, 1994, arguing the trial court abused its discretion by entering defendant's default for his failure to pay the judgment for his support delinquencies.

Without notice to defendant, an evidentiary hearing was held on December 8, 1994, during which the trial court received evidence in the form of testimony and exhibits on the merits of the divorce.[7] At this time, the trial court signed the proposed findings of fact and conclusions of law, but did not enter them pending a hearing set for January 9, 1995, on defendant's contempt and his motion to set aside the entry of default.

[1] Apparently in response to defendant's motion to set aside default, the trial court filed an "Order Clarifying Default" nunc pro tunc[8] on December 19, 1994.[9] This clarifying order stated that defendant's position that the default was entered based on defendant's failure to pay his delinquent support was "inaccurate," and went on to say

> 3. At the hearing September 27, 1994, the Court was persuaded, based on the Pleadings filed by the parties and their in–Court arguments, that Plaintiff was unable to determine the size of the marital estate. This was because it was all in Defendant's control and *he was hiding the assets contrary to the Court's Order he disclose them. Plaintiff asked that Defendant be defaulted*....
>
> ....
>
> 7. The Court finds that Defendant's pattern in ... (2) taking all known assets (a minimum of $552,000.00 at the time of separation, these being solely in liquid assets held at his employer Prudential Securities), and converting them to unknown accounts and *refusing to reveal any of them to Plaintiff or the Court*....
>
> ....
>
> 9. In her Motion for Default, Plaintiff submitted pertinent Rules and Utah case law justifying on the spot default in such situations.[10]

(Emphasis added.)

7. Rule 55(a)(2) of the Utah Rules of Civil Procedure provides

> [a]fter entry of the default of any party, ... it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding.

8. A nunc pro tunc order is used to "correct the court's omission or error." *In re Estate of Leone*, 860 P.2d 973, 978 (Utah App.1993). However, a nunc pro tunc order may not be used to address an issue not previously before the court. *Id.* In this case, the court utilized the nunc pro tunc order to correct the court's earlier error in not sufficiently stating the grounds justifying the entry of defendant's default.

9. At the December 8, 1994 hearing, plaintiff suggested the court enter this nunc pro tunc order to clarify the grounds for defendant's default. The trial court agreed and directed plaintiff to prepare the order.

10. Plaintiff's motion for default relied in part on Rule 37(b)(2)(C) of the Utah Rules of Civil Procedure, which in pertinent part provides:

> (2) If a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such

On the same day the court entered the clarifying order, the court entered another order captioned "order and notice of hearing" which, in pertinent part, provided:

> 9. *The Courts [sic] [November 1, 1994] Order to pay delinquencies or be defaulted[ ] did not state the underlying reasons for the Default Order.*
>
> 10. To deal with this the Court directed Plaintiff's counsel to submit a Clarifying Order of Default setting forth the Court's reasons. The Order was to include by reference pleadings pending before the Court on September 27, 1994, together with the content of the Findings, Conclusions, and Decree, *these all together stating the reasons underlying Defendant's being in a position to be defaulted.*

(Emphasis added.) The order also provided defendant notice of the hearing to be held on January 9, 1995, which would address defendant's motion to set aside the default and the entry of the findings of fact, conclusions of law, and decree of divorce. Additionally, defendant was ordered to personally appear at the January 9 hearing to address his contempt and the appropriate sanctions.

Although the January 9, 1995 hearing was held as scheduled, defendant failed to appear, citing threats on his life by plaintiff and their son and a new job as reasons justifying his absence. Following the January 9 hearing, the trial court entered the findings of fact, conclusions of law, and decree of divorce from the December 8, 1994 evidentiary proceeding and entered an order on March 6, 1995, titled "Order From Hearing Dated January 9, 1995, Re: Contempt and Other Issues." In the findings of fact supporting the March 6 order, the trial court found, in relevant part, that: (1) defendant's consistent position that he did not have sufficient income to pay the additional $1000 per month was a falsehood; (2) in defiance of the court's discovery order, defendant had steadfastly refused to reveal all of the accounts in which he had an interest; (3) defendant had failed to pay support since July 1, 1994: (4) defendant willfully failed to appear at the January 9, 1994 hearing without good cause; (5) "it is appropriate that Defendant's pleading be stricken if for no other reason than on the basis of his non payment of child support;" and (6) "*[t]he Court did expressly give the Defendant the opportunity to provide discovery in an appropriate manner which he failed to do. And as a result of these things the court felt that his default should be entered and pleadings stricken.*" (Emphasis added.) The court concluded, in relevant part, that (1) a bench warrant should be issued for defendant's arrest and (2) defendant's motion to set aside the default should be denied. Accordingly, based on the findings of fact and conclusions of law, the trial court ordered, in pertinent part, that (1) "*Defendant has not adequately provided discovery pursuant to Court Order and as such it is appropriate that his pleadings be stricken;*" and (2) that a bench warrant be issued for defendant's arrest. (Emphasis added.)

Defendant appeals.

ISSUES

[2] Defendant raises numerous issues on appeal. Defendant first argues the trial court did not have a legal basis to enter a default against him and, therefore, abused its discretion in doing so. Defendant next challenges the alimony award, asserting both that the evidence does not support the alimony awarded to plaintiff and that the trial court failed to make the necessary findings of fact. Defendant also challenges the child support award, claiming the amount awarded is contrary to the Child Support Guidelines. Defendant next alleges the trial court abused its discretion in valuing and dividing the marital estate. Defendant argues the trial court's award of attorney fees to plaintiff should be reversed because the trial court failed to make the required findings. Lastly, defendant claims the trial court erred by not

> orders in regard to the failure as are just, and among others the following:
>
> ....
>
> (C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

including the provisions of the juvenile court's order regarding custody and visitation into the divorce decree.[11]

ANALYSIS

A. Default

[3] Defendant claims the trial court entered his default because he failed to pay his past due temporary support obligations. Although the court's November 1 and November 30 orders support defendant's argument, subsequent orders demonstrate the trial judge defaulted defendant based on his failure to comply with discovery. Furthermore, defendant was put on notice that plaintiff was seeking default as a sanction for defendant's wilful noncompliance with discovery requests. Two of plaintiff's motions, one filed on March 10, 1994, and the other filed on September 9, 1994, requested that defendant be defaulted for his failure to comply with discovery. At the September 27, 1994 hearing, the trial court heard plaintiff's September 9 motion for default from which the order of default arose.

Additionally, at the January 9, 1995 hearing the court stated to the parties that defendant was given numerous opportunities to comply with discovery "which he failed to do." Consequently, the trial court denied defendant's motion to set aside his default and reinstate his pleadings. In the March 6, 1995 order, the trial court again specifically stated, "Defendant has not adequately provided discovery pursuant to Court Order and as such it is appropriate that his pleadings be stricken." Accordingly, it is clear the grounds for entering defendant's default were his failure to comply with discovery, as well as his failure to pay the court-ordered support. Thus, the issue becomes whether, under these circumstances, the trial court abused its discretion by entering the default and striking the pleadings.

[4, 5] The trial court has broad discretion to impose discovery sanctions upon a noncomplying party. *Utah Dep't of Transp. v. Osguthorpe*, 892 P.2d 4, 6 (Utah 1995). We will not reverse a trial judge's decision to impose discovery sanctions absent an abuse of that discretion. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 961 (Utah App.1989). Discovery sanctions are intended to deter misconduct and require a showing of willfulness, bad faith, or fault. *Osguthorpe*, 892 P.2d at 8.

[6] "The striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a nonresponding party." *Id.* at 7. Because of the severity of this type of sanction, "the trial court's range of discretion is more narrow than when the court is imposing less severe sanctions." *Id.* at 8.

In the case at bar, defendant secreted approximately $180,000 of his income while insisting to the court that he had insufficient income to pay an additional $1000 per month in support. When defendant finally disclosed what he had done, he explained the absence of these funds by presenting copies of the faces of cashier's checks purportedly sent to the Internal Revenue Service and the State of Arizona for tax liabilities. However, defendant has never presented the statements evidencing payment of these obligations in compliance with the May 27, 1994 discovery order. Defendant also failed to reveal several savings and investment accounts he held with Prudential and failed to comply with the trial court's discovery order by providing documentation of these accounts.

[7] "[T]he judicial system is not to be manipulated in divorce proceedings by one who actively and aggressively misleads the court and the opposing party...." *Boyce v. Boyce*, 609 P.2d 928, 931 (Utah 1980). Accordingly, the trial court did not abuse its discretion in entering defendant's default.[12]

11. Although the Statement of the Case section of defendant's brief states that the propriety of the bench warrant is also on appeal, it is not mentioned anywhere else in the brief. Thus, because the issue was not briefed, we do not address it. *See State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992).

12. Although the trial court may have erroneously entered defendant's default partially based on his failure to pay support arrearages, we may affirm based on the fact that the default was also sup-

B. Alimony Award

[8–11] Defendant also challenges the alimony award, claiming the trial court failed to enter the required findings. We will not disturb a trial court's alimony award absent a clear and prejudicial abuse of the considerable discretion granted the trial court in determining the award. *Breinholt v. Breinholt*, 905 P.2d 877, 879 (Utah App.1995). It is well grounded in Utah law that the trial court must consider: " '(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income; and (3) the ability of the supporting spouse to provide support.' " *Godfrey v. Godfrey*, 854 P.2d 585, 589 (Utah App.1993) (citation omitted). A trial court abuses its discretion when it fails to consider the enumerated factors. *Willey v. Willey*, 866 P.2d 547, 550 (Utah App.1993). "Thus, 'the trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon' " the required factors. *Id.* (citation omitted). Accordingly, " '[i]f sufficient findings are not made, we must reverse unless the record is clear and uncontroverted such as to allow us to apply the ... factors as a matter of law on appeal.' " *Id.* (citation omitted).

After reviewing the trial court's findings on alimony, we find them to be "so inadequate that we cannot determine the legal basis of the award or whether the trial court abused its discretion in the amount of the award." *Bell v. Bell*, 810 P.2d 489, 493 (Utah App.1991). Thus, "we reverse and remand the alimony award for additional findings on each of the ... [required] factors ..., and a reassessment of the alimony award based upon those findings[,]" if necessary. *Id.*

C. Property Division

[12–15] Defendant argues the trial court abused its discretion in valuing and dividing the marital estate. The trial court entered findings regarding the value of the marital property, which defendant now claims are in error.[13] However, in order to challenge a trial court's findings of fact on appeal, the challenger "must marshal *all* the evidence in support of the findings and then demonstrate that the evidence is insufficient to support the findings in question." *Phillips v. Hatfield*, 904 P.2d 1108, 1109 n. 1 (Utah App. 1995) (emphasis added). We will uphold the trial court's findings of fact if a party fails to appropriately marshal all of the evidence. *Allred v. Brown*, 893 P.2d 1087, 1090 (Utah App.1995). Defendant has not properly marshaled the evidence but has merely recited the findings on point and then highlighted the evidence which he deems contrary to the findings. Accordingly, we do not disturb the trial court's findings and affirm the awards on appeal.[14]

D. Plaintiff's Attorney Fees

[16, 17] Defendant claims the trial court erred in ordering him to pay plaintiff's attorney fees because the court failed to consider defendant's ability to pay and plaintiff's need for the award. The trial court has the authority to award attorney fees in a divorce action pursuant to Utah Code Ann. § 30–3–3 (1995). However, the decision to make such

ported on the basis of defendant's noncompliance with the discovery orders. *See generally, DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995) (may affirm on any proper basis even though trial court's ruling was based on other ground), *State ex rel. H.R.V & B P V*, 906 P.2d 913, 918 (Utah App 1995) (same)

13. This notwithstanding defendant's evidentiary contribution to the fact finding process.

14. We note defendant's argument that the trial court erred in valuing the marital property at the time of the parties' separation. "However, where one party has dissipated an asset, hidden its value, or otherwise acted obstructively, the trial court may, under its broad discretion, value the property at an earlier date, i.e., separation " *Peck v Peck*, 738 P.2d 1050, 1052 (Utah App 1987). Defendant has acted obstructively in the case at bar by failing to give accurate, verifiable accountings of his income and assets. Thus, it was well within the trial court's discretion to value the property at the time of the parties' separation, as opposed to valuing the property at the time of trial. *See Shepherd v. Shepherd*, 876 P 2d 429, 432–33 (Utah App.1994).

an award " 'must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees.' " *Willey v. Willey*, 866 P.2d 547, 555 (Utah App. 1993) (quoting *Bell v. Bell*, 810 P.2d 489, 493 (Utah App.1991)). The failure to consider any of the enumerated factors is ground for reversal on the fee issue. *See id.* at 556; *Rudman v. Rudman*, 812 P.2d 73, 77 (Utah App.1991).

The trial court entered the following finding of fact regarding attorney fees:

> Plaintiff's fees and costs were submitted by ledger ... to the court in the total sum of $25,844.88. Plaintiff's attorney ... was sworn and testified concerning the fees. He testified that his hourly charge was $120.00, his associate ... $100.00, that those were reasonable and customary, and most were incurred in efforts to have Defendant reveal his finances. The Court finds under all circumstances including the *parties[']* *ability to pay* and Defendant's demonstrated pattern of conduct, that Plaintiff's fees and costs are reasonable *and necessary* in full, and awards Plaintiff judgment for fees and costs against the Defendant in the sum of $25,844.88.

(Emphasis added.)

Although the trial court concludes that plaintiff's attorney fees were "necessary," there is no finding regarding plaintiff's need for an award of attorney fees. As a result, the findings and conclusions are insufficient to allow a meaningful review of the trial court's ruling, especially in the face of the award of substantial marital assets. *See Willey*, 866 P.2d at 555 (" 'We have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award.' ") (citation omitted). We therefore reverse the attorney fees award to plaintiff and remand for the entry of further findings consistent with this opinion.

[18, 19] Plaintiff requests attorney fees on appeal. Generally, when fees in a divorce case are granted to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal. *Bell v. Bell*, 810 P.2d 489, 494 (Utah App.1991). In this case, if the trial court determines that plaintiff is still entitled to attorney fees after considering the above enumerated factors, because she prevailed on the central issue on appeal, the entry of defendant's default, she shall be awarded her attorney fees incurred as a result of this appeal. *See id.* This amount shall be determined on remand.

E. Failure to Incorporate Juvenile Court's Order

[20] Lastly, defendant takes issue with the failure of the district court to incorporate into the divorce decree the juvenile court's order regarding custody and visitation. Plaintiff agrees with defendant's position to the effect that crucial language regarding joint custody and ongoing counseling was omitted. Accordingly, we remand the issue to the district court so that the order of the juvenile court can be incorporated into the divorce decree.

CONCLUSION

[21, 22] We conclude the trial court did not abuse its discretion in entering defendant's default. As a result, the evidentiary hearing conducted on December 8, 1994, and the entry of the findings of fact, conclusions of law, and decree of divorce were proper. Furthermore, because defendant did not marshal all of the evidence in support of the trial court's findings regarding the valuation and division of the marital property, this court will not disturb the trial court's findings on appeal. We remand the issue of alimony for the entry of further findings. We also remand to the trial court for findings on the issue of plaintiff's need for attorney fees and, if appropriate, the determination of

plaintiff's attorney fees on appeal. Lastly, we remand so the juvenile court's order may be incorporated in the divorce decree.[15]

GREENWOOD and JACKSON, JJ., concur.

15. Defendant also claimed that the child support amount was incorrect. However, after reviewing defendant's argument, we find the trial court did not deviate from the child support guidelines, *see* Utah Code Ann. § 78–45–7.12 (Supp.1995), and accordingly, find defendant's claim to be without merit. Thus, we decline to discuss it on appeal. *See State v. Allen*, 839 P.2d 291, 303 (Utah 1992).

We also reject defendant's argument that plaintiff's brief should be stricken for failure to comply with the Utah Rules of Appellate Procedure. Finally, we reject defendant's request that Judge Harding be recused from the case because defendant failed to brief the issue on appeal. *See State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992).

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

* * * * *

ANN ELIZABETH THOMAS,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. 934402503
	)	
BERT CHARLES THOMAS,	)	VOLUME II
	)	
Defendant.	)	

* * * * *

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(BENCH TRIAL)

BEFORE THE HONORABLE LYNN W. DAVIS

DECEMBER 6, 1995

Q. Is it a Sub S corporation?

A. No, it's a regular.

Q. It's a C corp. So the corporation paid taxes?

A. In that year they did pay taxes, that's true.

Q. And they kept money in the corporation?

A. Yes, they did, in that year.

Q. And there are good reasons for a construction company to keep money in the corporation?

A. There are good reasons for a construction company to maintain a good cash balance. As to whether or not it's good for them to keep net income in there, I question that as a tax planning vehicle.

Q. Some of the reasons the corporation may need money, obviously, is to pay bills; that would be true?

A. That's correct.

Q. And an important reason they might need capital is for bonding; that would be true, wouldn't it?

A. That's correct.

Q. How do these figures, how do your figures with respect to the income that you claim that Mr. Thomas should have or should be impugned to him, how do those compare with his actual tax returns over the last two to three years?

A. His personal tax returns?